

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 13-CV-11694-DJC  
(Honorable Denise J. Casper, District Court Judge)

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In Re: ROBERT E. SPAGNUOLO, JR.

Chapter 7 Case No. 11-10844 JNF  
Adversary Proceeding No. 11-01290 JNF

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ROBERT E. SPAGNUOLO, JR, d/b/a  
SPAGNUOLO CONSTRUCTION,  
Defendant-Appellant

EDWINA BROOKE-PETIT,  
Plaintiff-Appellee

On Appeal From An Order Of The United States Bankruptcy Court  
For The District Of Massachusetts  
(Honorable Joan N. Feeney, Bankruptcy Judge)

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**RECORD APPENDIX**

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
EASTERN DIVISION

In re:	)	Chapter 7
	)	
ROBERT E. SPAGNUOLO, JR.,	)	Case No. 11-10844-JNF
	)	
Debtor	)	
	)	
	)	
	)	
	)	
EDWINA BROOKE-PETIT,	)	Adversary Proceeding No. 1101290
	)	
	)	
Plaintiff,	)	
v.	)	
	)	
ROBERT SPAGNUOLO, d/b/a	)	
SPAGNUOLO CONSTRUCTION,	)	
	)	
Defendants.	)	
	)	

**MOTION FOR SUMMARY JUDGMENT**

Now comes Edwina Brooke-Petit (the "Plaintiff"), and hereby moves this Court for summary judgment pursuant to Fed. R. Civ. P. 56, as made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7056.

In support hereof, the Plaintiff states as follows:

**Background**

The Plaintiff has pled a prima facie cause of action in the Complaint. The Defendant was engaged to perform and supervise extensive renovations to the Plaintiff's real property located at 131 Timberlane Drive, Mashpee, Massachusetts (the "Property"). The Defendant failed to

provide the Plaintiff with a written contract prior to commencement of the project as required by Statute, Mass Gen Laws Chapter 142A, section 2). The Defendant both performed certain services himself, and hired and supervised other contractors to provide services in connection with the project including subcontractors related to the defendant. The Defendant failed to obtain proper and required permits, and the permit he did obtain was incomplete, incorrect and signed without authorization from the Plaintiff. The Defendants work was shoddy, incomplete and not done in a workmanlike manner. The Defendant failed to properly supervise his subcontractors and their work was similarly substandard and incomplete. The Defendant made false representations to the Plaintiff and fraudulently obtained money from the Plaintiff. A copy of the Complaint is annexed hereto as Exhibit "A".

In or about November of 2006 the Plaintiff instituted suit against the Defendant in the Middlesex Superior Court (the "Trial Court") for damages arising from Defendants breach of contract, fraud, unfair and deceptive acts and practices in violation of Massachusetts General Laws Chapter 93A, and breach of Massachusetts General Laws Chapter 142A. The Trial Court held a four (4) day trial ending on August 24, 2010. The Judge gave a detailed and explicit instruction on each of the five (5) elements of fraud. The Jury entered a verdict of \$250,000.00 against the Defendant and found fraud as evidenced by a "yes" response to special questions, including: "Did the Defendant commit fraud, deceit, and/or misrepresentations by any means, in connection with the services provided by the Defendant to the Plaintiff?"

On August 24, 2010, and immediately after the Jury had been discharged, the Trial Judge held a hearing pursuant to Massachusetts Rules of Civil Procedure Rule 69, to determine the Defendants ability to satisfy the Judgment entered in the Trial Court. At the Rule 69 hearing, during which the Defendant was represented by counsel, the Judge stated, at page 15, "this is a

fraudulent finding by the jury...it's not protected by bankruptcy..." A copy of the Rule 64 Transcript is annexed hereto as Exhibit "B".

The Defendant filed a Notice of Appeal which he did not prosecute and on December 28, 2010 the appeal was dismissed, with prejudice. On February 1, 2011 the Defendant filed the above-captioned Chapter 7 case. The Plaintiff then filed a Complaint seeking to bar the Defendants discharge under 11 U.S.C. sections 523(a) (2) and (6).

#### Summary Judgment Standard

A motion for summary judgment is governed by the same standards applicable to motions under Fed. R. Civ. P. 56. See Fed. R. Bankr. P. 7056. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary Judgment is appropriate when the pleadings in a case tend to prove the absence of a genuine dispute of any material fact. Celotex Corp. v. Catrett, 277 U.S. 317, 323 (1986). A material issue is one that affects the outcome of litigation. To be considered "genuine" for Rule 56 purposes, a material issue must be established by sufficient evidence supporting the claimed factual dispute...to require a jury or judge to resolve the parties' differing versions of the truth at trial.

"A material issue is one which affects the outcome of the litigation. To be considered 'genuine' for Rule 56 purposes a material issue must be established by 'sufficient evidence supporting the claimed factual dispute...to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" Hahn v. Sargent, 523 F.2d 461,464 (1<sup>st</sup> Cir. 1975) quoting First National Bank of Arizona v. Cities Service Co. Inc., 391 U.S. 253, 289 (1968).

Preclusive effect of a pre-petition Judgment

Preclusion principles apply to actions seeking to except debts from discharge. Blacksmith Invs., Inc. v. Woodford (In re Woodford), 418 B.R. 644, 650 (B.A.P. 1st Cir. 2009) (citing, *inter alia*, Grogan v. Garner, 498 U.S. 279, 284 n.11, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)). Bankruptcy courts must apply the collateral estoppel law of the state in which the judgment was rendered. U.S. v. One Parcel of Real Property, 900 F.2d 470, 473 (1st Cir. 1990).

It is well settled that res judicata is not applicable to dischargeability actions because the granting of a discharge is within the exclusive province of the bankruptcy court. Brown v. Feisen, 442 U.S. 127 (1979). Unlike res judicata, collateral estoppel principles apply in proceedings to determine dischargeability of a debt. Grogan v. Garner, 498 U.S. 279, 285; Brown, 442 U.S. at 139 n. 10 (“[i]f, in the course of adjudicating a state law question, a state court should determine factual issues using standards identical to those [under the discharge provision of the bankruptcy code], then collateral estoppel...would bar re-litigation of those issues in the bankruptcy court”). The elements most at issue are (i) whether the issues determined in the pre-petition litigation are identical to the issues in question in the dischargeability action; and (ii) whether the issue one party is seeking to preclude from a new determination was actually litigated in the pre-petition case. Collateral estoppel will bar the re-litigation of a claim if (1) the issue is identical, (2) the issue was resolved finally on the merits, and (3) the party to be estopped appeared as a party in the first action. In re: Petrucelli v. D’Abrosca, 2011 Bankr. LEXIS 3007.

Collateral estoppel bars re-litigation of an issue previously decided if the party against whom the prior decision is asserted had a full and fair opportunity to litigate that issue in an earlier case. For collateral estoppel to apply to a later action, a party must establish that: (1) the issue sought to be precluded is the same as that in the prior action; (2) the issue was actually

litigated in the prior action; (3) the issue was determined by a valid and binding final judgment, and (4) the issue's determination was essential to the judgment. An issue may be actually decided even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached in the prior litigation. In re Jones, 300 B.R. 133, 137 (B.A.P. 1st Cir. 2003). Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30-31 (1st Cir. 1994). In order to determine whether an issue was actually decided in pre-petition litigation such that re-litigation is barred in a subsequent dischargeability action, the court must compare the pre-petition judgment with the elements of a dischargeability objection. In re: Slosberg, 225 B.R. 9 (D. ME 1988).

#### Jury Instructions and Collateral Estoppel

Courts have examined whether the state court jury instructions were sufficient to allow for application of collateral estoppel in a non-dischargeability action. See, e.g., Duncan v. Duncan (In re Duncan), 448 F.3d 725, 729-30 (4th Cir. 2006) (declining to apply collateral estoppel for summary judgment where jury instruction resulted in two categories of willful and wanton conduct.); Bailey v. Cook (In re Bailey), 34 Fed. Appx. 150 (5th Cir. 2002) (ruling jury instructions and findings rose to the level of § 523(a)(2)(A) warranting application of collateral estoppel); Hobson Mould Works, Inc. v. Madsen (In re Madsen), 195 F.3d 988, 989-90 (8th Cir. 1999) (granting summary judgment as jury instruction definitions were equal to standards under § 523(a)(6)); Stahl v. Gross, 288 B.R. 655, 658 (Bankr. E.D.N.Y. 2003) ("An examination of the jury instructions in the context of the applicable law governing the tort of malicious prosecution clearly demonstrates that the issue of willfulness within the meaning of § 523(a)(6) was actually and necessarily litigated in the earlier malicious prosecution action."); Big River Props., Inc. v. Stafford (In re Stafford), 223 B.R. 94, (Bankr.) N.D. Miss. 1998) granting

summary judgment based upon issue preclusion as jury instruction contained same standard for action under § 523(a)(2)(A)).

#### Argument

It is presumed that juries follow instructions, U.S. v. Griffin, 524 F.3d 71, 78 (1st Cir. 2008). Annexed hereto as Exhibit "C" is a copy of the Special Jury Verdict Slip entered in the Trial Court, which states that the facts presented at trial were sufficient to support a finding that the Defendant committed "fraud, deceit and/or misrepresentation". Further, the Jury found facts sufficient to find that the Debtor violated M.G.L. c. 142A and consequently, by statute, the M.G.L. c. 93A.

The Trial Judge, in his jury instructions, went into great detail as to the five elements of fraud. Annexed hereto as Exhibit "D" is a copy of the relevant portions of the Trial Transcript as it relates to the jury instructions. In the jury instructions, the trial judge discussed in detail the five elements of fraud. See Transcript at page 27, line 21 through page 30, line 17. The Trial Judge then went on to discuss in detail false statements and intentional misrepresentations. See Transcript page 30, line 18 through page 32, line 11 and willful disregard of the truth and the Plaintiffs reliance thereon. See Transcript page 32, line 12 through page 34, line 1. The Judge also went on to discuss M.G.L. c. 142A and stated at page 39, lines 22 through 24 that a violation of M.G.L. c. 142A constituted a violation of M.G.L. c. 93A. Lastly, the Judge discussed the elements of a violation of M.G.L. c. 93A. See Transcript page 40, line 20 through page 42, line 23.

There is nothing in the jury instruction that allow the inference that the damages from fraud did not constitute the entire amount of the judgment. In addition, the Judge specifically made it clear the entire amount of the judgment stemmed from the Debtor's fraudulent activities



and was non-dischargeable. If the Debtor thought the jury findings were incomplete, it was incumbent upon the Debtor to have the jury instructions and findings distinguish between damages resulting from different counts if he thought the damages were different from different counts in the complaint. The Debtor had every opportunity to differ the amount of damages resulting from the different counts at the time of trial and subsequent appeal. He did not do so. The consequence of his failure to act is that there is no jury finding that he can rely upon to assert all of the damages did not result from fraud. Consequently, there is no basis for this Court to find that a portion of the damages did not result from fraud.

The Supreme Judicial Court explained that under M.R.C.P. 49(a), the jury does not issue a general verdict. Solimene v. B. Grauel & Co., KG, & another, 399 Mass. 790 (1987); Commonwealth v. Licciardi, 387 Mass. 670 (1982). A verdict under rule 49(a) consist of a "statement of facts the jury have found from which the judge determines the appropriate judgment." Commonwealth Ibid at 675. It is further explained that "if the jury's answer can be harmonized, they must be resolved so as to harmonize them" [citations omitted] Solimene Ibid at 800. Ambiguity is not to be construed in favor of disregarding a verdict reached after many days of trail

This is especially true here where the Debtor already had two bites of the apple trying to re-litigate. First, he sought a new trial which was denied. Second, he sought an appeal which he did not pursue. He should not now be able to waste the resources of the plaintiff and the Bankruptcy Court forcing them to re-litigate the issue of fraud when fraud was already found in a multi-day trial.



Under section 523(a)(6) there must be a finding of willful and malicious injury, while under 523(a)(2) the court must find false pretenses, a false representation or actual fraud. As the trial transcript shows, these elements were explained in detail in the jury instructions on fraud and intentional misrepresentation. Therefore, it is clear that these issues were actually litigated in the Trial Court.

Based upon the foregoing, collateral estoppel should apply and the Plaintiff should be entitled to judgment on the basis of the allegations of the Complaint and other evidence properly before this Court.

EDWINA BROOKE-PETIT,  
By her Attorneys,

/s/ Bill N. Jacob, Esq.  
Bill N. Jacob, Esq. (BBO #550959)  
Herbert Weinberg, Esq. (BBO #550415)  
Rosenberg & Weinberg  
805 Turnpike Street, Suite 201  
North Andover, MA 01845  
(978) 683-2479

November 13, 2012

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS

IN RE:

ROBERT E. SPAGNUOLO, JR.,  
DEBTOR

CHAPTER 7  
CASE NO. 11-10844-JNF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion for Summary Judgment was day sent, by first class mail, postage prepaid or through the Court's ECF system to the following:

U. S. Trustee's Office  
John W. McCormack Building  
Post Office Square  
Boston, MA 02109

Laurel E. Bretta, Esq.  
Bretta & Grimaldi, PA  
19 Mystic Avenue  
Medford, MA 02155

John Aquino, Esq.  
Anderson Aquino, LLP  
240 Lewis Wharf  
Boston, MA 02110

Recovery Management Systems Corp.  
25 SE 2<sup>nd</sup> Avenue, Ste. 1120  
Miami, FL 33131

Signed under the penalties of perjury this 15<sup>th</sup> day of November 2012.

/s/ Herbert Weinberg  
Herbert Weinberg (BBO #550415)  
Rosenberg & Weinberg  
805 Turnpike Street  
North Andover, MA 01845  
(978) 683-2479  
[hweinberg@jrhwlaw.com](mailto:hweinberg@jrhwlaw.com)

# EXHIBIT A

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS

IN RE:

ROBERT E. SPAGNUOLO, JR.,  
DEBTOR

CHAPTER 7  
CASE NO. 11-10844-JNF

Edwina Brooke-Petit,  
Plaintiff

Adv. Pro. No. \_\_\_\_\_

v.

Robert Spagnuolo, d/b/a  
Spagnuolo Construction  
Defendants

**COMPLAINT TO DETERMINE DISCHARGEABILITY**

Plaintiff, Edwina Brooke-Petit, brings this action to determine that her claims against the Defendant, Robert Spagnuolo, d/b/a Spagnuolo Construction, are nondischargeable pursuant to 11 U.S.C. Section 523(a)(2) and 11 U.S.C. Section 523(a)(6).

**Jurisdiction and Venue**

1. The Court has jurisdiction over this Application pursuant to 28 U.S.C. Sections 157 and 1334.
2. Venue is proper in this District pursuant to 28 U.S.C. Sections 1408 and 1409. This is a "core" proceeding pursuant to 28 U.S.C. Section 157(b).
3. The statutory predicate for the relief sought herein is 11 U.S.C. Section 523(a).

**Parties**

4. Plaintiff, Edwina Brooke-Petit ("Brook-Petit"), is an individual with a principal residence of 535 Beacon Street Boston, Massachusetts 02454.
5. The Defendant, Robert Spagnuolo, d/b/a Spagnuolo Construction ("Spagnuolo") is an individual with a principal residence of 50 North Margin Street, Boston, Massachusetts 02113.

**Facts Common to All Counts**

6. Brooke-Petit is the owner of certain real estate located 131 Timberlane Drive, Mashpee, Massachusetts (the "Premises").
7. Upon information and belief, Spagnuolo is engaged in the construction industry, providing renovation, construction and general contractor services to, *inter alia*, home owners in the Commonwealth.
8. In 2005, Brooke-Petit engaged Spagnuolo to perform and supervise extensive renovations and construction at the premises (the "Project").
9. Spagnuolo failed to provide Brooke-Petit with a written contract prior to commencement of the Project.
10. Spagnuolo both performed certain services himself, and hired and supervised other contractors to provide other services in connection with the Project (the "Subcontractors").
11. Spagnuolo failed to obtain proper and required permits in connection with the Project. The permit that he did obtain was incomplete, incorrect and he signed without authorization on behalf of Brooke-Petit.
12. Spagnuolo's work was shoddy, incomplete and incompetent and caused significant damage to the Premises.
13. Spagnuolo failed to supervise the Subcontractors.
14. The work of Subcontractors was also substandard and unacceptable, causing further damage to the Premises.
15. The value of the Property was substantially diminished due to Spagnuolo's conduct and as a result, the then existing structure had to be torn down and a new structure built.
16. Brooke-Petit has suffered substantial damages caused by Spagnuolo's breach of contract and other failures and conduct, and is not aware of any liability insurance of Spagnuolo suitable to cover such damages.
17. Spagnuolo made false representations including but not limited to the services performed.
18. Spagnuolo fraudulently obtained money from Brooke-Petit.
19. Spagnuolo obtained money from Brooke-Petit under false pretenses.

20. On November 2, 2006, Brooke-Petit filed a complaint against Spagnuolo in the Middlesex County Superior Court (the "Trial Court") for damages resulting from the Spagnuolo's breach of contract, fraud, unfair and deceptive trade practices in violation of Massachusetts General Laws Chapter 93A, and breach of Massachusetts General Laws Chapter 142A (the "Trial Court Complaint"). A true and accurate copy of the Trial Court Complaint is incorporated herein by reference and attached hereto as Exhibit A.
21. The State Court held a four day trial ending on August 24, 2010.
22. The Judge gave a detailed and explicit instruction on each of all five elements of fraud and the damages to be assessed.
23. On August 24, 2010, the jury entered a verdict of \$250,000 against the Debtor. The jury found fraud as evidenced by the Jury's "yes" response to special questions, including:

FRAUD:

3. Did the Defendant commit fraud, deceit, and/or misrepresentations by any means, in connection with the services provided by the Defendant to the Plaintiff?"
22. On August 24, 2010, immediately after the Jury had been discharged, the Judge hearing the matter, Judge Dennis J. Curren, held a Massachusetts Rules of Civil Procedure Rule 69<sup>1</sup> to determine the Debtor's ability to pay the said judgment. A copy of the transcript is annexed hereto as Exhibit "B".
4. At the Rule 69 hearing during which the Debtor had counsel, the transcript on page 15 (15) reflects:
- The Court: this is a fraudulent finding by the jury. Do you understand?
- Mr. Spagnuolo: Yes
- The Court: It's not protected by bankruptcy. Are we all on the same page?
- Mr. Spagnuolo: Yes.

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<sup>1</sup> Mass. R. Civ. P. Rule 69 (Execution), states as follows: Process to enforce a judgment for the payment of money shall be a writ of execution, unless the Court directs otherwise. The procedure on execution, in proceedings on and in aid of execution shall be in accordance with applicable statutes. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

- 23 The Defendant Spagnuolo timely filed a notice of appeal which he did not prosecute, and on or about December 28, 2010, the Court dismissed the appeal with Prejudice. It is apparent that Debtor only filed the Notice of Appeal to allow him to sell real property, his principal residence at 8 Concord Road, Stoneham, MA, on September 15, 2010, to a third party, at a substantial gain.<sup>2</sup>
24. On February 1, 2011, Robert Spagnuolo, Jr. (the "Debtor") filed a voluntary petition for relief under Chapter 7 of the Code.

#### COUNT I

##### (Nondischargeability – 11 U.S.C. Sec. 523(a)(2))

25. Brooke-Petit repeats and incorporated by reference the allegations in contained in paragraph 1 through 24 of this Complaint.
26. Section 523(a) of the Bankruptcy Code excepts certain debts from discharge, and provided in pertinent part:
- A discharge under Section 727, 1141, 1228(a), 1228(b) or 1328b) of this title does not discharge an individual debtor from any debt
- (2) ...money...to the extent obtained by (a) False Pretenses, a false representation or actual fraud
- 11 U.S.C. Section 523(a).
27. Spagnuolo's conduct in connection with the Trial Court Complaint was false pretenses, false representation and actual fraud.
28. Spagnuolo's conduct in connection with the Trial Court Complaint injured Brooke-Petit and the Property.
29. Brooke-Petit's claims against Spagnuolo arise out of the Judgment on account of Spagnuolo's false pretenses, false representations and actual fraud.
30. Brooke-Petit's entire claims against Spagnuolo are nondischargeable pursuant to Section 523(a)(2) of the Bankruptcy Code.

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<sup>2</sup> On or about September 16, 2010, \$337,151.87 was deposited into an account at Century Bank, #21663920, under the Debtor's wife's name (Andrea Spagnuolo). This deposit coincides with the recording of the Deed for the 8 Concord Road property on September 15, 2010. Further, this property was originally purchased by Debtor for fair market value (\$93,000.00) on June 17, 1988. Brooke asserts that it was fraudulently transferred by Debtor to a nominee trust and then to Debtor's wife for nominal consideration. Notwithstanding, at all times Debtor unilaterally controlled the property and the proceeds thereof.



31. The fraud issue was finally adjudicated in State Court and the Debtor is collaterally estopped from challenging that the claims are nondischargeable under 11 U.S.C. Section 523(a)(6).

## COUNT II

### (Nondischargeability – 11 U.S.C Section 523(a)(6))

32. Brooke-Petit represents and incorporates herein by reference the allegations contained in paragraphs 1 through 31 of this Complaint.
33. Section 523(a) of the Bankruptcy Code excepts certain debts from discharge and provided, in pertinent part:

A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—

- (6) for willful and malicious injury by the Debtor to another entity or to the property of another entity.

11 U.S.C. Section 523(a)

34. Spagnuolo's conduct in connection with the Trial Court Complaint was willful and malicious.
35. Spagnuolo's conduct in connection with the Trial Court Complaint violated Chapter 93A and Chapter 142A of the Massachusetts General Laws.
36. Spagnuolo's conduct in connection with the Trial Court Complaint injured Brooke-Petit and the Property.
37. Brooke-Petit's claims against Spagnuolo arise out of the Judgment on account of Spagnuolo's willful and malicious injury to her.
38. Brooke-Petit's entire claims against Spagnuolo are nondischargeable pursuant to Section 523(a)(6) of the Bankruptcy Code.

WHEREFORE, Edwina Brooke-Petit respectfully requests that this Court:

- (a) after trial, enter judgment in favor of Brooke-Petit and against Spagnuolo on Count I of the Complaint;
- (b) after trial, enter judgment in favor Brooke-Petit and against Spagnuolo on Count II of the Complaint;

- (c) after trial, enter judgment determining that the claims of Brooke-Petit against Spagnuolo are nondischargeable pursuant to Section 523(a)(2) of the Bankruptcy Code; and
- (d) award Brooke-Petit such other and further relief as this Court deems just and necessary.

Edwina Brooke-Petit

By her attorneys,

/s/ Herbert Weinberg

Herbert Weinberg (BBO #550415)

Rosenberg & Weinberg

805 Turnpike Street

North Andover, MA 01845

(978) 683-2479

hweinberg@jrhlaw.com

Dated: September 28, 2011

# EXHIBIT B

Exhibit b

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## COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

\*\*\*\*\*

EDWINA BROOKE-PETIT  
Plaintiff

\*  
\*  
\*

v.

\* DOCKET NUMBER MICV2006-04145

\*  
\*  
\*  
\*

ROBERT SPAGNUOLO  
Defendant

\*\*\*\*\*

RULE 69 CONFERENCE  
BEFORE THE HONORABLE DENNIS J. CURRAN

## APPEARANCES:

109 Highland Avenue  
Needham Heights, Massachusetts 02494  
By: Michael Magerer, Esq.

For the Defendant:  
175 Federal Street  
Boston, Massachusetts 02110  
By: Robert C. Gabler, Esq.

Woburn, Massachusetts  
August 24, 2010

Recording produced by digital audio recording system. Transcript  
produced by Approved Court Transcriber, Donna Holmes

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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Testimony of Mr. Spagnuolo				
By the Court, page 3				
By Mr. Magerer, page 13				

PROCEEDINGS

(Court called to order.)

THE CLERK: Back on the record, your Honor.

THE COURT: All right.

All right. Mr. Spagnuolo is here. Ms. Edwina Brooke-Petit is here.

All right. We are going to conduct a Rule 69 hearing right now and put Mr. Spagnuolo on the witness stand.

Mr. Spagnuolo, would you come up, and we're going to determine what your assets are.

THE CLERK: Do I have to swear him in, your Honor?

THE COURT: That would be nice.

ROBERT SPAGNUOLO, Sworn

THE COURT: Mr. Spagnuolo, good afternoon.

MR. SPAGNUOLO: Good afternoon, Judge.

THE COURT: We have just seen a jury verdict in the amount of \$250,000 against you personally. Did you hear that verdict in Court?

MR. SPAGNUOLO: Yes, your Honor.

THE COURT: You also heard that there was a -- fraudulent conduct engaged in by you, did you hear that too?

MR. SPAGNUOLO: Yes. Yes.

THE COURT: All right. And do you know what the interest factor is on this verdict of \$250,000?

MR. SPAGNUOLO: No.

Donna Holmes  
(781) 575-8000

1 THE COURT: All right. It's forty -- Martha, could you tell  
2 Court Officer Mulane to keep it down?

3 THE CLERK: Certainly.

4 THE COURT: It's \$112,500 for a total value in this jury  
5 verdict so far, \$362,000. Do you have that with you? Or do  
6 you have assets --

7 MR. SPAGNUOLO: Yeah, I have it in my pocket, your Honor.

8 THE COURT: Ha, ha. All right. How are you going to pay  
9 this?

10 MR. SPAGNUOLO: I can't pay it.

11 THE COURT: You can't pay it. Do you have a wallet?

12 MR. SPAGNUOLO: What's that?

13 THE COURT: Do you have a wallet?

14 MR. SPAGNUOLO: No.

15 THE COURT: You don't have a wallet?

16 MR. SPAGNUOLO: No. A wallet?

17 THE COURT: Yes.

18 MR. SPAGNUOLO: No, I don't.

19 THE COURT: What do you have on you, sir?

20 MR. SPAGNUOLO: Nothing.

21 THE COURT: You don't have anything on you? You have no  
22 money on you at all? Do you mind standing up, sir?

23 MR. SPAGNUOLO: Yeah.

24 THE COURT: Do you mind opening your pockets?

25 MR. SPAGNUOLO: Yeah, what do you want? My money?

Donna Holmes  
(781) 575-8000



1 THE COURT: I want you to put on the table what you have got  
2 for money.

3 MR. SPAGNUOLO: That's what I have.

4 THE COURT: Is that it?

5 MR. SPAGNUOLO: That's it, sir.

6 THE COURT: Okay. Anything else?

7 MR. SPAGNUOLO: No.

8 THE COURT: All right. And how much is that?

9 MR. SPAGNUOLO: I don't know.

10 THE COURT: Okay, less than twenty bucks? Okay. All right.

11 Where are your bank accounts, Mr. Spagnuolo?

12 MR. SPAGNUOLO: What?

13 THE COURT: Your bank accounts. What bank do you do banking  
14 at?

15 MR. SPAGNUOLO: Stoneham Savings.

16 THE COURT: Stoneham Savings. How many banks do you have --  
17 bank accounts do you have there?

18 MR. SPAGNUOLO: That's it.

19 THE COURT: Take a seat. Anywhere else?

20 MR. SPAGNUOLO: No.

21 THE COURT: All right. And how many -- you have one bank  
22 account there?

23 MR. SPAGNUOLO: Yes.

24 THE COURT: Do you have -- do you have a money market  
25 account?

Donna Holmes  
(781) 575-8000

1 MR. SPAGNUOLO: No.

2 THE COURT: Do you have a savings account there?

3 MR. SPAGNUOLO: No.

4 THE COURT: You just have a checking account?

5 MR. SPAGNUOLO: Yes.

6 THE COURT: And what property do you own, real property?

7 MR. SPAGNUOLO: I don't own any property, your Honor.

8 THE COURT: Nothing?

9 MR. SPAGNUOLO: No.

10 THE COURT: Are you a trustee of any property?

11 MR. SPAGNUOLO: I'm a trustee, that's it.

12 THE COURT: All right. Well, why don't you tell me, because  
13 we're on the record, and we are under oath, Mr. Spagnuolo.

14 I'd like to know what properties you are a trustee of?

15 MR. SPAGNUOLO: I'm a trustee of Stoneham Trust.

16 THE COURT: Where else?

17 MR. SPAGNUOLO: What's the name of the trust you're talking  
18 about?

19 THE COURT: I want to know what real property you have an  
20 interest in, either by beneficiary or by being a trustee.

21 MR. SPAGNUOLO: I'm a trustee. That's it.

22 THE COURT: And what property does the Stoneham Trust have  
23 an interest in?

24 MR. SPAGNUOLO: What property? 8 Concord Road.

25 THE COURT: 8 Concord Road.

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1 MR. SPAGNUOLO: Yes.

2 THE COURT: What else?

3 MR. SPAGNUOLO: 50 No Margin.

4 THE COURT: 15 what?

5 MR. SPAGNUOLO: 50 No Margin.

6 THE COURT: Could you spell that?

7 MR. SPAGNUOLO: N-O-M-A-R-G-I-N. Street.

8 THE COURT: Nomargin?

9 MR. SPAGNUOLO: North Margin.

10 THE COURT: Oh, North Margin.

11 MR. SPAGNUOLO: Yeah.

12 THE COURT: Okay. And what cities or towns are those two

13 properties in?

14 MR. SPAGNUOLO: Boston, Mass.

15 THE COURT: For 8 Concord Road?

16 MR. SPAGNUOLO: Stoneham, Mass.

17 THE COURT: All right. What -- North Margin, where is that?

18 MR. SPAGNUOLO: In Boston.

19 THE COURT: East Boston or the north end?

20 MR. SPAGNUOLO: No, north end.

21 THE COURT: North end. And what's the assessed value on that

22 property? Come on?

23 MR. SPAGNUOLO: Probably a million.

24 THE COURT: A million. And how about 8 Concord Road? What's

25 the assessed value on that?

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1 MR. SPAGNUOLO: Probably 650.

2 THE COURT: 650. Are you a beneficiary of either of these  
3 properties?

4 MR. SPAGNUOLO: No.

5 THE COURT: Do you have a trust document?

6 MR. SPAGNUOLO: I don't have it with me.

7 THE COURT: Okay. Are you going to get it for us?

8 MR. SPAGNUOLO: If you want them, I'll get them for you.

9 THE COURT: Yes, this is not an idle question, sir. I want  
10 them by tomorrow morning at nine o'clock.

11 Are you a beneficiary of any real estate trust?

12 MR. SPAGNUOLO: No, sir.

13 THE COURT: Are you sure of that?

14 MR. SPAGNUOLO: I'm positive.

15 THE COURT: Okay. What credit cards do you have?

16 MR. SPAGNUOLO: I don't have any at all.

17 THE COURT: No credit cards at all?

18 MR. SPAGNUOLO: I've got American Express.

19 THE COURT: Oh, you do have an American Express.

20 MR. SPAGNUOLO: Yes.

21 THE COURT: So that's a credit card, right? Or a charge card  
22 I suppose?

23 MR. SPAGNUOLO: Yeah.

24 THE COURT: All right. Do you have that card with you today?

25 MR. SPAGNUOLO: No.

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1 THE COURT: Is it in your car?  
2 MR. SPAGNUOLO: No, sir.  
3 THE COURT: Did you leave your wallet in your car, sir?  
4 MR. SPAGNUOLO: I never carry a wallet, your Honor.  
5 THE COURT: Okay. All right. You agree to provide your  
6 American Express card number to Mr. Magerer?  
7 MR. SPAGNUOLO: Yes.  
8 THE COURT: Okay. What cars do you have an interest in?  
9 MR. SPAGNUOLO: Cars?  
10 THE COURT: Cars.  
11 MR. SPAGNUOLO: Driving you mean, driving cars? Passenger  
12 cars?  
13 THE COURT: Is there any other kind of car?  
14 MR. SPAGNUOLO: Passenger. I got a Navigator.  
15 THE COURT: A Navigator.  
16 MR. SPAGNUOLO: Yes.  
17 THE COURT: Is that a Lincoln Continental?  
18 MR. SPAGNUOLO: Yes.  
19 THE COURT: A Lincoln. Is it out here in the parking lot?  
20 MR. SPAGNUOLO: Yes.  
21 THE COURT: Okay. And is there any reason why I shouldn't  
22 turn that right over to Ms. Petit-Brooke -- Brooke-Petit?  
23 MR. SPAGNUOLO: She can have it if she wants it.  
24 THE COURT: All right. Fair enough.  
25 MR. SPAGNUOLO: I owe money on it.

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1 THE COURT: Turn it over to her as soon as you leave the  
2 courtroom. Give her the keys, get your stuff out of it. It's  
3 hers. Any car loans?

4 MR. SPAGNUOLO: Yes.

5 THE COURT: All right. Other than the Navigator, any car  
6 loans?

7 MR. SPAGNUOLO: A truck loan.

8 THE COURT: A truck loan. And what is the truck that you  
9 own?

10 MR. SPAGNUOLO: It's a Ford.

11 THE COURT: A Ford. What year is it?

12 MR. SPAGNUOLO: It's a 2007.

13 THE COURT: Is there any lien on it?

14 MR. SPAGNUOLO: Yes.

15 THE COURT: Okay. Do you want to share with me what the lien  
16 is?

17 MR. SPAGNUOLO: I think \$20,000.

18 THE COURT: \$20,000. What's the value of it?

19 MR. SPAGNUOLO: Probably \$20,000, your Honor. I don't know.

20 THE COURT: When was the last time you filed Federal taxes?

21 MR. SPAGNUOLO: Last year.

22 THE COURT: Okay. You're going to get those tax returns to  
23 Mr. Magerer for the last five years.

24 MR. SPAGNUOLO: Yes.

25 THE COURT: All right. Get it? All right.

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1 Do you have cable television?  
2 MR. SPAGNUOLO: Yes.  
3 THE COURT: And who is your carrier?  
4 MR. SPAGNUOLO: Comcast.  
5 THE COURT: Comcast. And what package do you have?  
6 MR. SPAGNUOLO: Standard package.  
7 THE COURT: And how much do you pay a month?  
8 MR. SPAGNUOLO: Eighty something dollars I think.  
9 THE COURT: Eighty a month? Do you have a computer at home?  
10 MR. SPAGNUOLO: I don't use it. I do have one though.  
11 THE COURT: Okay. What kind is it?  
12 MR. SPAGNUOLO: I don't even know.  
13 THE COURT: You don't use it at all?  
14 MR. SPAGNUOLO: I don't use the computer.  
15 THE COURT: Okay. And do you have a cell phone?  
16 MR. SPAGNUOLO: Yes.  
17 THE COURT: With what company?  
18 MR. SPAGNUOLO: Nextel.  
19 THE COURT: What's your telephone number, please?  
20 MR. SPAGNUOLO: It's not mine though, your Honor.  
21 THE COURT: What is the telephone number that you use when  
22 you --  
23 MR. SPAGNUOLO: 781-589-6141.  
24 THE COURT: All right. Is there any other real property that  
25 you have an interest in of any kind either --

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1 MR. SPAGNUOLO: I have no interest in none of them. No.

2 THE COURT: As a trustee of Stoneham Trust, you don't -- and  
3 other than those two properties, real -- 8 Concord Road in  
4 Stoneham, and 5 North Margin in the north end, no other  
5 properties that your --

6 MR. SPAGNUOLO: 52 Beech Street Account Trust.

7 THE COURT: 52 what?

8 MR. SPAGNUOLO: Beech Street.

9 THE COURT: B-E-E-C-H?

10 MR. SPAGNUOLO: Yes.

11 THE COURT: And where is that?

12 MR. SPAGNUOLO: That's in Wareham.

13 THE COURT: Wareham. And what property does that trust own?

14 MR. SPAGNUOLO: Say that again, sir?

15 THE COURT: What property does that trust own? Is there a  
16 trust on that or is it --

17 MR. SPAGNUOLO: It's a trust.

18 THE COURT: And what's the name of the trust, 52 Beech  
19 Street?

20 MR. SPAGNUOLO: I'm pretty sure, yes.

21 THE COURT: And is there a trust document on that?

22 MR. SPAGNUOLO: Yes.

23 THE COURT: And are you beneficiary of that as well?

24 MR. SPAGNUOLO: No.

25 THE COURT: Okay. Are you beneficiary of any trust?

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1 MR. SPAGNUOLO: No.

2 THE COURT: Is there any other trust that's been established  
3 for your benefit?

4 MR. SPAGNUOLO: No.

5 THE COURT: Any other trust in which you have an interest?

6 MR. SPAGNUOLO: No.

7 THE COURT: Okay. All right.

8 Mr. Magerer, any questions? This is the first of a series  
9 probably of depositions as to assets. Understood?

10 MR. MAGERER: Yes, Judge.

11 THE COURT: This is just the beginning round, okay. So  
12 don't feel constrained, but we need to establish what -- what  
13 Mr. Spagnuolo is going to do to satisfy this judgment.

14 Go ahead.

15 MR. MAGERER: Should I address Mr. Spagnuolo, your Honor?

16 **EXAMINATION OF ROBERT SPAGNUOLO**

17 **BY MR. MAGERER:**

18 MR. MAGERER: Mr. Spagnuolo, do you currently have any  
19 investments in the form of securities or stocks or bonds?

20 MR. SPAGNUOLO: No.

21 MR. MAGERER: And do you currently own or maintain any  
22 collections such as coin collections, gun collections, stamp  
23 collections, or anything of value such as that?

24 MR. SPAGNUOLO: No.

25 MR. MAGERER: And do you have -- do you currently have any

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1 ownership interest meaning owning any stock or any units in  
2 what might be referred to as a corporation or an LLC, a  
3 limited liability company, or any type of limited partnership  
4 or partnership?

5 MR. SPAGNUOLO: No. I have my own liability company. My  
6 company is an LLC.

7 MR. MAGERER: And what's the name of your LLC?

8 MR. SPAGNUOLO: Spagnuolo Construction LLC.

9 MR. MAGERER: And, Mr. Spagnuolo, do you have any  
10 investments outside of the country, whether that be real  
11 estate or any other type of personal property or assets?

12 MR. SPAGNUOLO: No.

13 MR. MAGERER: Your Honor, at this time, other than the other  
14 basic questions that you asked, off the top of my head, I'm  
15 not sure what else I can ask that would be --

16 THE COURT: All right. So, this is what I'm looking for.  
17 Mr. Spagnuolo will turn the keys over to that Lincoln  
18 Navigator and he can get a ride with -- with counsel or some  
19 other means of getting home tonight. But that Navigator is  
20 turned over forthwith, understood?

21 MR. SPAGNUOLO: I don't own it, your Honor.

22 THE COURT: Fair enough. Then just turn it over.

23 MR. SPAGNUOLO: I will, but I don't own it.

24 THE COURT: Who owns it?

25 MR. SPAGNUOLO: The bank owns it.

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1 THE COURT: Turn it over, we'll figure it out.

2 MR. SPAGNUOLO: All right.

3 THE COURT: I -- I want to see a writ of attachment as to  
4 any personal property that Mr. Spagnuolo has, and any trustee  
5 process as to any bank accounts that he's got.

6 I also want to see five years of tax returns turned over to  
7 Mr. -- Mr. Magerer by the end of the week.

8 If there are any other assets that you can think of that  
9 you, you know, that you may have forgotten this afternoon, I  
10 am going to order that you promptly notify Mr. Magerer through  
11 counsel. Understood?

12 MR. SPAGNUOLO: Yes.

13 THE COURT: Okay. Okay, because we want this judgment  
14 satisfied. We don't want people, you know, walking away from  
15 them and thinking that because, you know, they could declare  
16 bankruptcy, or some people think that they could, they're  
17 going to get away from it. But this is a fraudulent finding  
18 by the jury, do you understand that?

19 MR. SPAGNUOLO: Yes.

20 THE COURT: It's not protected by bankruptcy. Are we all on  
21 the same page?

22 MR. SPAGNUOLO: Yes.

23 THE COURT: Okay. Very good.

24 Mr. Magerer, I would suggest that you proceed with counsel  
25 to get a date for Mr. -- a continued deposition of Mr. -- Mr.

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1 Spagnuolo. Okay.

2 MR. MAGERER: I will do that, your Honor.

3 Your Honor, may I ask a question on the 93A finding in  
4 terms of submitting to you a request for attorney's fees. May  
5 I have a week or so to do that?

6 THE COURT: They found no -- let's -- let's -- I would focus  
7 on the collection aspects before you start talking about the  
8 money. You're not going to get any -- if you put your -- do  
9 whatever you want. Yeah, you can have a month, I don't care.  
10 But I would focus on the collection efforts and forget about  
11 the 93A for the time being.

12 MR. MAGERER: I will take --

13 THE COURT: Because there is going to be nothing left by the  
14 time you get around to drafting your 93A Petition.

15 MR. MAGERER: I will take your advice, your Honor.

16 THE COURT: All right. Do whatever you want.

17 Mr. Spagnuolo, thank you very much.

18 Mr. Gabler, it's been a pleasure to work with both of you.

19 MR. GABLER: Thank you.

20 Your Honor, may I just get clarification on one thing. You  
21 said turn over trust documents. Did you say by nine o'clock  
22 tomorrow morning?

23 THE COURT: No, no, no, no. I'll give him to the end of the  
24 week on the trust documents.

25 MR. GABLER: And would they -- they would go to Mr. Magerer?

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1 THE COURT: They go to you through -- to -- to you -- to  
2 him through you. Okay.

3 MR. GABLER: To Mr. Magerer through me.

4 THE COURT: Right. Any bank accounts, any tax returns for  
5 the last five years, any mortgage applications, any car loans,  
6 any car registrations, any photocopies of credit or charge  
7 cards, American Express or for whatever, they go back to Mr.  
8 Magerer as soon as possible. And trust documents as well. And  
9 in the meantime, I'm making a specific order, clear and  
10 unequivocal, so that everybody understands, Mr. Spagnuolo was  
11 not to make one, not one cent of transfer from any bank  
12 account, credit charge, or any sort of depository in which he  
13 has an interest until further order of the Court. If he does,  
14 he's in violation of this order. Okay. Until we can sort this  
15 out.

16 Thank you very much.

17 MR. MAGERER: Thank you, your Honor.  
18  
19  
20  
21  
22  
23  
24  
25

(Adjourned)

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# EXHIBIT C



EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS  
THE SUPERIOR COURT

MIDDLESEX, ss.

CIVIL ACTION NO.: 06-CV-4145-P

EDWINA BROOKE-PETIT,  
Plaintiff,

v.

ROBERT SPAGNUOLO,  
Defendant.

**SPECIAL JURY VERDICT SLIP**

**Breach of Contract**

1. Did the Plaintiff and Defendant enter into an oral or written agreement/contract, pursuant to which the Defendant agreed to provide remodeling and construction services, materials, and supplies (collectively referred to hereafter as the "services") and the Plaintiff agreed to pay for those services as they were provided?

Yes ☒ No ☐

(If your answer to Question 1 is "Yes," go to Question 2. If your answer to Question 1 is "No," go to Question 3.)

2. Did the Defendant breach the oral or written agreement/contract with the Plaintiff by failing to provide the services contracted for or by overcharging the Plaintiff?

Yes ☒ No ☐

(Please proceed to Question 3.)

Fraud

3. Did the Defendant commit fraud, deceit, and/or misrepresentation by any means, in connection with the services provided by the Defendant to the Plaintiff?

Yes ☒ No ☐

(Please proceed to Question 4.)

G.L. c. 142A

4. Did the Defendant violate Massachusetts General Laws, Chapter 142A, regarding the regulation of home improvement contractors, by any means, in connection with the services provided by the Defendant to the Plaintiff?

Yes ☒ No ☐

(Please proceed to Question 5.)

Damages (as to Questions 1-4)

5. What amount of money would fully and fairly compensate the Plaintiff for any injury and/or damage she has sustained because of the Defendant's conduct, based on your answers to Questions 1 through 4.

\$ 250,000  
Amount in Figures

Two Hundred Fifty Thousand and No Dollars.  
Amount in Words

(If your answer to Question 4 is "yes," you must find that there was a violation of Massachusetts General Laws, Chapter 93A and proceed to Question 7. If your answer to Question 4 is "no," please proceed to Question 6.)

G.L. c. 93A, §9

6. (a) Did the Plaintiff send an adequate demand letter to the Defendant at least 30 days before November 20, 2006?

Yes \_\_\_\_\_ No \_\_\_\_\_

(If your answer to Question 6(a) is "Yes," proceed to Question 6(b). If your answer to Question 6(a) is "No," STOP HERE, sign this Verdict Slip, and return to the courtroom.)

(b) Was the Defendant engaged in trade or commerce when he entered into an agreement with the Plaintiff to provide remodeling and construction services, materials, and supplies (collectively referred to hereafter as the "services") to the Plaintiff and/or was the Defendant engaged in trade or commerce in the course of providing and performing any such services for the Plaintiff?

Yes \_\_\_\_\_ No \_\_\_\_\_

(If your answer to Question 6(b) is "Yes," go to Question 6(c). If your answer to Question 6(b) is "No," STOP HERE, sign this Verdict Slip, and return to the courtroom.)

(c) Did the Defendant act unfairly or deceptively when he entered into an agreement with the Plaintiff to provide the

services to Plaintiff and/or did the Defendant act unfairly or deceptively in the course of providing and performing any such services for the Plaintiff?

Yes \_\_\_\_\_ No \_\_\_\_\_

(If your answer to Question 6(c) is "Yes," go to Question 6(d). If your answer to Question 6(c) is "No," STOP HERE, sign this Verdict Slip, and return to the courtroom.)

(d) Did the unfair or deceptive acts that the Defendant did cause injury or loss to the Plaintiff?

Yes \_\_\_\_\_ No \_\_\_\_\_


(If your answer to Question 6(d) is "Yes," go to Question 7. If your answer to Question 6(d) is "No," STOP HERE, sign this Verdict Slip, and return to the courtroom.)

7. In finding a violation of Massachusetts General Laws, Chapter 93A, you may award the Plaintiff double or triple the amount(s) awarded to the Plaintiff in response to Question 5; therefore, what amount of money do you award to the Plaintiff, as a result of the Defendant's violation of Massachusetts General Laws, Chapter 93A, which amount can be either double or triple the amount(s) awarded in response to Question 5?

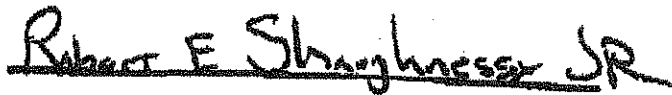
\$                       
Amount in Figures

Zero \_\_\_\_\_ Dollars.  
Amount in Words

(STOP HERE, sign this Verdict Slip, and return to the courtroom.)



Signature of Jury Foreperson



Printed Name of Jury Foreperson

August 24, 2010

# EXHIBIT D

EXHIBIT D

Volume I  
Pages: 1-62  
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

\*\*\*\*\*

EDWINA BROOKE-PETIT  
Plaintiff

\*  
\*  
\*

V.

\* DOCKET NUMBER MICV2006-04145  
\*

ROBERT SPAGNUOLO  
Defendant

\*  
\*  
\*

\*\*\*\*\*

JURY INSTRUCTIONS ONLY  
BEFORE THE HONORABLE DENNIS J. CURRAN

Woburn, Massachusetts  
August 24, 2010

Recording produced by digital audio recording system. Transcript  
produced by Approved Court Transcriber, Donna Holmes

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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None - Jury Instructions Only				
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P R O C E E D I N G S

(Court called to order.)

THE COURT: Ladies and gentlemen of the jury, you're about to begin your final duty which is to decide the factual issues in this case. Before you do that, I'm going to instruct you on the law.

As I said at the outset of this case, my function as the Judge in this case is to make sure that -- that this trial -- trial was conducted fairly, orderly, and efficiently. It's also my responsibility to rule on what you may consider as evidence and to instruct to you on the law as it applies to this case.

It is your duty, in fact your sworn duty, as jurors to accept the law as I state it to you. Consider all of my instructions as a whole. Don't ignore any instruction. Don't give special attention to one in particular instruction. Follow the law as I give it to you whether you agree with it or not.

It's the duty of both lawyers in this case to object when the other side offered evidence that that lawyer believed was not admissible under our rules of evidence. They also had an obligation to be -- speak to me at sidebar about questions of law which the law requires me to rule on outside of your hearing.

Now, the purpose, contrary to what you see on Hollywood

1 drama and television programs, the purpose of such objections  
2 and sidebar conferences is not to play a shell game with the  
3 evidence. It's not to keep relevant information from you.  
4 Actually, it's just the opposite. To make sure what you hear  
5 is relevant to this case and that the evidence is presented in  
6 a way to give you a fair opportunity to evaluate its worth, so  
7 what I'm saying is, in short, don't draw any inference  
8 favorable or unfavorable toward either lawyer or their client  
9 for objecting to proposed evidence or requesting sidebar  
10 conferences. That's the professional responsibility of the  
11 lawyer.

12 Let me talk to you about your function. You determine the  
13 facts of the case. You're the sole and exclusive judges of  
14 the facts. You alone determine what evidence to accept, how  
15 important any evidence is that you do accept and what  
16 conclusions to draw from all the believable evidence. Apply  
17 the law as I give it to you to the facts -- I'm going to have  
18 to give you some medicine or something here. Take -- take  
19 whatever you need.

20 UNIDENTIFIED ATTORNEY: I'm sorry, your Honor.

21 THE COURT: It's all right. It's all right. It's just that  
22 it's kind of an important part of the trial. Take whatever he  
23 needs.

24 You alone determine what evidence to accept, how important  
25 any evidence is that you do accept, and what conclusions to

1 draw from all the believable evidence. Apply the law as I  
2 give it to you to the facts as you determine them to be in  
3 order to decide whether Ms. Brooke-Petit has proven her case.

4 Now, determine the facts based solely on a fair  
5 consideration of the evidence. Be completely fair and  
6 impartial. Don't be swayed by prejudice, sympathy, likes or  
7 dislikes towards either side. Don't decide this case based on  
8 anything you may have seen or heard out -- outside of this  
9 courtroom, and don't engage in any guesswork about any  
10 unanswered questions that remain in your mind or speculate  
11 what the real facts may or may not have been if there weren't  
12 introduced into evidence in this case.

13 Please also don't consider anything that I've said or done  
14 during the course of the trial in ruling on motions or  
15 objections or comments to the lawyers or in questions to a  
16 witness, I think I asked one question to one witness just to  
17 clarify something that I thought may have been confusing to  
18 all of us, or in setting forth the law in these instructions  
19 as any opinion that I have about what your verdict ought to  
20 be. Please do not believe that I have any opinion about what  
21 the facts of this case are. I have not read -- in truth, I  
22 have not read the exhibits. There is -- there's many, many,  
23 many, many exhibits, many, many, many photographs and -- and  
24 almost none of them have I studied, so I -- I really do not  
25 have any opinion about the case. That's your province.

1 That's your constitutional responsibility and that is your  
2 duty, not mine.

3 Let's talk about what constitutes evidence. Decide this  
4 case, as I've said several times now, based solely on the  
5 evidence in this case, not from suspicion, not from  
6 conjecture, and not from matters not admitted into evidence.

7 Now, the evidence consists of the testimony of witnesses as  
8 you recall it and any documents or photographs or other things  
9 that have been marked as exhibits, and you'll have all of  
10 those with you in the jury deliberation room. There'll  
11 actually probably be a little bit of a pause before you see  
12 those exhibits because the lawyers want to put them in order.  
13 We have to verify that they're all accounted for and then we  
14 introduce them to you through the Court Officer to you in the  
15 jury deliberation room.

16 Now, you alone determine the weight, the value, and  
17 importance of the testimony and the exhibits to help you make  
18 your ultimate judgment about whether the plaintiff has proven  
19 her case.

20 Now, we in the legal profession love paper. We actually  
21 all should own stock in paper companies, I'm convinced. But -  
22 - and I'm convinced also that we -- we love it too much, but  
23 just because lawyers love paper and -- doesn't mean that you  
24 should fall in love with paper also. A -- in other words,  
25 what I'm trying to tell you is just because something's on a

1 piece of paper, doesn't mean you have to believe it. You can  
2 believe it, you don't have to believe it. You can believe  
3 some of what's on it or not. It's your call. It's entirely  
4 your call.

5 Now, the quality or strength of the proof isn't determined  
6 by the sheer volume of exhibits or the number of witnesses or  
7 evidence. It's rather the weight of the evidence, the  
8 strength intending to prove the issue that's at stake that's  
9 important. You can find, for example, that a smaller number  
10 of witnesses who testify to a particular fact are more  
11 believable than a larger number of witnesses who testify to  
12 the opposite or vice versa.

13 Now, as I said at the beginning, some things are during --  
14 occur during the course of the trial are not evidence, and  
15 don't consider them as evidence when you decide the facts of  
16 the case.

17 A lawyer's question to a witness, not evidence. Only the  
18 answer that comes out of the mouth of the witness is evidence.

19 Don't consider any answer that I told you was stricken from  
20 the record. I may have told you to strike it or disregard it  
21 meaning don't consider such answers.

22 Anything that you may have seen or heard outside of the  
23 courtroom when it wasn't in session is not evidence.

24 Opening statements, not evidence.

25 Closing arguments of the lawyers, not evidence. In fact,

1 nothing that's said by either lawyer or myself for that matter  
2 constitutes evidence.

3 My instructions on the law, not evidence. And if you or I  
4 have referred to evidence in a way that -- I mean the lawyers  
5 or I have referred to evidence in a way that differs from your  
6 memory, it is your collective recollection that controls.

7 Consider the evidence as a whole. Don't make up your mind  
8 about what the verdict should be until -- should be until  
9 after you've gone into the jury deliberation room and  
10 discussed this case with your fellow jurors. Keep an open  
11 mind until that point.

12 Let's talk about the two kinds of evidence. If you take  
13 anything away from this several days' experience, take this.  
14 Evidence comes in in two forms. You may hear some people on  
15 TV who really don't know what they're talking about say, well,  
16 Jack, that case was all circumstantial. I'm imitating some  
17 reporter on a scene usually on a case in a California. They  
18 always seem to be in California. Maybe it's more interesting  
19 to live there. I don't know, but they do seem to be in  
20 California. So the point is that these talking heads on  
21 television will say well that was all circumstantial as if  
22 you, the listener on the TV or anybody else, should completely  
23 disregard a case because it's a circumstantial evidence case.  
24 Absolutely, totally, completely, utterly wrong.

25 There are in fact two ways of move -- moving a case, of

1 proving a case. One is direct evidence.

2 Direct evidence is pretty simple. It's what someone claims  
3 to have seen or testifies directly about a fact to be proven  
4 based on what they claim to have seen or heard or felt with  
5 their own five senses. Really, that's what direct evidence  
6 is. Very simple. And really the only question for you on  
7 direct evidence is do you believe the witness. Do you believe  
8 the witness?

9 Now, what circumstantial evidence -- it's -- it's where the  
10 witness cannot testify directly about the fact to be proven  
11 but your presented with evidence of other facts, and then  
12 you're asked to draw reasonable inferences or conclusions  
13 about the fact to be proven. All of that legal language can  
14 be summed up in the following example.

15 You were with us all day yesterday. Chances are you just  
16 didn't have a chance, unless you live in the neighborhood,  
17 didn't have a chance to get home during lunch. Your mail was  
18 not there in the morning. It was, you know, the long weekend.  
19 It was the weekend so chances are you -- you obviously don't  
20 get any mail on Sunday, but no mail in the morning. Mail at  
21 the end of the day. You have no direct evidence you observed  
22 the letter carrier drop off the mail, but your reasonable  
23 inferences based on your experience that usually, if your  
24 house is like mine, the mail gets delivered between 10 and  
25 2:30 just about every day. So there's no direct evidence that



1 you've observed the letter carrier. Circumstantial evidence.  
2 Wasn't there in the morning, was there in the evening,  
3 reasonable inference is that it was delivered.

4 There are, however, two rules to keep in mind about  
5 circumstantial evidence. The first is that you can draw  
6 inferences or conclusions only from facts that have been  
7 proven to you, and the second rule is that any inference or  
8 conclusion that you do draw must be reasonable and natural  
9 based on your common sense and life experience. Your common  
10 sense and life experience.

11 Now, you'll hear me use that phrase a couple more times  
12 before I'm done. Common sense and life experience.

13 What's an inference? Well, the law defines it as a  
14 permissible deduction you may make from evidence that you've  
15 accepted as believable. Inferences are things that you do  
16 every day. Excuse me. Little steps in reasoning. You take  
17 some known information, you apply your life experience to it,  
18 and then you draw a conclusion. You may draw an inference  
19 even if it isn't necessary or inescapable so long as it is  
20 reasonable and warranted by the evidence.

21 Let's talk about the credibility of witnesses. It's  
22 obviously your duty to decide disputed questions of fact. You  
23 have to determine which witnesses to believe and how much  
24 weight or importance to give their testimony. Give the  
25 testimony of each witness whatever degree of belief and



1 importance you Judge it's fairly entitled to receive. You are  
2 the sole judges, the sole judges of the credibility or  
3 believability of the witnesses. And if there are conflicts in  
4 their testimony, obviously this is an adversary process. Two  
5 sides to a story if you will. It is your function to resolve  
6 those conflicts and determine where the truth lies. You  
7 determine where the truth lies.

8 Now ,you can believe everything a witness says, you can  
9 believe most of it, you can believe half of it, you can  
10 believe some of it, you can believe a little bit of it, you  
11 can believe none of it. It's your call. It's entirely your  
12 call. In deciding whether to believe a witness and how much  
13 importance to give a witness's testimony, look at all the  
14 evidence, drawing upon your common sense and life experience.

15 Often as you know, and I know, what -- often it isn't what  
16 somebody says but how they say it to give you a clue to -- as  
17 to whether you should accept their version of an event as  
18 believable.

19 Now, some of the things you can consider are a witness's  
20 appearance, their demeanor on the witness stand, frankness or  
21 lack of frankness, whether the testimony is reasonable or  
22 unreasonable, probable or improbable. You can also take into  
23 account how good an opportunity the witness had to observe the  
24 facts about which he or she testifies, their degree of  
25 intelligence and whether their memory seems accurate. Those

1 are some of the tools to think about.

2 You may also consider a witness's motive for testifying,  
3 whether they display any bias in testifying, whether or not  
4 they have any interest in the outcome of the case.

5 Now, just because a witness has some interest in the  
6 outcome of a case doesn't mean that that witness -- witness  
7 isn't trying to tell you the truth as he or she recalls or  
8 believes it to be but -- but a witness's interest is a factor  
9 that you may consider with all the other factors in deciding  
10 issues of credibility.

11 Now, where there are discrepancies or inconsistencies in a  
12 witness testimony or between the testimony of different  
13 witnesses, that may or may not cause you to discredit such  
14 testimony. Why? People -- the folks that come in are not  
15 professional witnesses. They're laypeople. They get nervous,  
16 they're anxious, this is a very formal atmosphere. I don't  
17 know how you feel now, but I'm sure the first day or first  
18 hour, maybe you had butter -- had butterflies in your stomach,  
19 you were a little -- felt a little bit ill -- ill at ease, so  
20 too witnesses do often times, and sometimes they're just --  
21 people just forget things or they get confused. Sometimes  
22 people remember things differently. Sometimes, however,  
23 people lie.

24 In weighing such discrepancies, you should consider whether  
25 they involve important facts or only minor details and whether

1 the discrepancies result from innocent lapses of memory or  
2 intentional falsehoods.

3 Now, there's one more point to make about witnesses, and  
4 that is expert witnesses. You heard from what expert  
5 witnesses, that's people who have -- that is -- those are,  
6 excuse me, people who have specialized training or experience  
7 in a particular field. Generally -- generally speaking in our  
8 Courts, whether it be a civil case or a criminal case,  
9 witnesses may testify only to facts within their personal  
10 knowledge. That is things they've personally seen or heard or  
11 felt.

12 In a small number of cases, or a variety of cases I should  
13 say, issues that arise that are beyond the can or the  
14 experience of -- of laypeople, and in those kinds of cases, we  
15 allow a person with specialized training or experience, called  
16 the expert witness, to testify, and they'll not only testify  
17 to facts, but they're also permitted to testify to their  
18 opinion and the reasons for those opinions on issues that are  
19 within the witness's field of expertise and are relevant and  
20 material to the case.

21 Now, because a particular witness has -- witness has  
22 specialized training and experience in that field, doesn't put  
23 that witness on a higher level or plain that any other  
24 witness, and treat the so called expert witness just like you  
25 would treat any other witness.

1 In other words, as with other witnesses, it's completely up  
2 to you to decide whether you accept the testimony of an expert  
3 witness including the opinions the witness gave. It's  
4 entirely also up to you decide whether you accept the facts  
5 upon which the expert relied and what conclusions, if any,  
6 that he -- you can draw from the expert's testimony.

7 You're free to reject the testimony and opinion of such a  
8 witness in whole or in part. If you determine that the  
9 witness's opinion is not based on sufficient education and  
10 experience or the testimony of the witness was motivated by  
11 some bias and interest in the outcome of the case, you may  
12 consider those factors as well.

13 You must also, as I've been explaining to you, keep firmly  
14 in mind that you alone, you alone, determine what the facts  
15 are. If you conclude that an expert's opinion isn't based on  
16 the facts as you find those facts to be, you may reject the  
17 testimony and opinion of the expert in whole or in part.

18 Remember that expert witnesses do not decide cases. Jurors  
19 do.

20 And in the final analysis, an expert witness is just like  
21 any other witness in the sense that you alone make the  
22 judgment about how much credibility and weight to give the  
23 expert's testimony and what conclusions to draw from that  
24 testimony.

25 Let's shift for a moment to the burden of proof.

1 In a civil case, as I've said before, Ms. Edwina Brooke-  
2 Petit has the burden of proving her case by a preponderance of  
3 the evidence. As I said before, this is a less strict  
4 standard than the standard in the criminal case where the  
5 prosecution or the government must prove its case beyond a  
6 reasonable doubt, that -- that proof standard does not apply  
7 here. It is not a standard of proof beyond a reasonable  
8 doubt.

9 In a civil case such as this, the plaintiff is not required  
10 to prove her case beyond a reasonable doubt. Instead, she  
11 meets her burden when she shows it to be fact -- truth -- true  
12 by a preponderance of the evidence, by a preponderance of the  
13 evidence. That means such evidence which, when compared and  
14 considered with any opposed to it, produces in your mind a  
15 belief that what is sought to be proven is more probably true  
16 than not true.

17 So when you think of the phrase preponderance of the  
18 evidence, it's just legal language, mumbo jumbo if you will or  
19 -- to -- to mean more likely than not. We use all these fancy  
20 phrases, but we're trying to basically speak English here.  
21 More probably true than not true that -- that's what we're  
22 talking about.

23 Now, a matter has been proven by a preponderance of the  
24 evidence, meaning more likely than not, if you determine,  
25 after you've weighed all the evidence, the matter is more

1 probably true than not true. So if you were to put the  
2 credible evidence on the opposite sides of the scales of  
3 justice, for example, Ms. Edwina Brooke-Petit must prove  
4 enough evidence to skip those scales ever so slightly in her  
5 balance. If she fails to do this -- if she fails to do this,  
6 you must return a verdict for the defendant.

7 Now, those are the generic or general instructions that I  
8 give pretty much at the beginning of every civil case. I'm  
9 going to turn, if I may, to a discussion of what I call the  
10 case specific instructions on the breach of contract issue, on  
11 the home improvement contract issue, and on the Chapter 93A or  
12 consumer protection or unfair or deceptive acts statute.

13 As for the lat -- latter two theories of recovery for the  
14 plaintiff, meaning the home improvement statute or the Chapter  
15 93A, let me tell you in a nutshell what I'm referring to.

16 Those are statutes. Statute is a law passed by the  
17 legislature, the general -- they call it the General Court in  
18 Massachusetts. All of those general laws are contained in  
19 this green set of books behind me, and just to give you a --  
20 you -- you may see, for example, a District Attorney or -- or  
21 an Attorney General or a lawyer giving a press conference  
22 about some legal issue. Sometimes you'll see this green set  
23 of books behind them. These are the general laws of  
24 Massachusetts. They start with Chapter 1, they finish with  
25 Chapter 282.

1 Chapter 1, just to give you a -- a two second overview of  
2 this, deals with the powers of the government, the governors  
3 powers, the lieutenant governor, the general -- Attorney  
4 General, Auditor, and so forth, and then you span to chapter  
5 thirty-nine and forty and forty-one deals with cities and  
6 towns, taxation. I never really touch that. Chapters fifty-  
7 eight, nine, and sixty, down here, sometimes you'll hear well  
8 that's a Chapter 90 violation. Chapter 90 is the book.  
9 Chapter 90 on registry violations, moving violations.  
10 Hopefully none of you know anything about that, okay.

11 Public health violations are Chapter 111, public safety  
12 143-148, and then you get the really juicy stuff, the criminal  
13 stuff, which is chapter -- Chapter 263 to 5 and the  
14 punishments are in 268. Just a -- a parenthetical note, when  
15 I was a kid, a lawyer was throwing out -- who was friendly  
16 with my dad, my dad was not a lawyer, but he -- he knew him  
17 and he gave him a book. It had the chapters -- the  
18 punishments on the laws, like the criminal laws, Chapter 282.  
19 Well, that's the one book out of all of them that he gave. I  
20 was only like fourteen, and I used to read that thing. How  
21 geeky can a kid be at fourteen to read those because they had  
22 all these weird laws like dueling, you know, and mayhem, and I  
23 just -- you know, I was just a kid. You know, I thought these  
24 -- this is a cool just to read this stuff, so that's how geeky  
25 I was as a kid, not -- not that I'm any changed or anything

1 but --

2 So in any event, those are -- those are the general laws,  
3 and so when I refer to the home improvement statute, that's  
4 where it's coming from is Chapter 142A of the general laws.

5 Chapter 93A deals with unfair or deceptive acts and  
6 practices, and again, that's from the general laws, but let me  
7 -- let me shift as I -- if I may to the first theory of  
8 recovery of the plaintiff and that is on breach of contract.  
9 But let me -- let me give you the introduction first of all.

10 I may refer to Ms. -- Ms. Brooke-Petit -- Petit as the  
11 plaintiff, and I'll refer to the defendant as Mr. Spagnuolo.  
12 My goal in -- in presenting these instructions is to ensure  
13 that you treat the parties in a fair and impartial way.

14 Ms. Brooke-Petit has brought this lawsuit against Mr.  
15 Spagnuolo on three different theories of recovery or causes of  
16 action or claims, whatever you want to call it. They also  
17 center on Mr. Spagnuolo's alleged failure to perform  
18 construction or remodeling services at her home at 131  
19 Timberland Drive in Mashpee, Massachusetts.

20 Her claims include the following.

21 One, a breach of contract against Mr. Spagnuolo.

22 Two, a claim of -- for fraud against Mr. Spagnuolo.

23 And, three, a claim under Chapter 142A which is entitled  
24 the regulation of home improvement contractors.

25 We'll also be talking about Chapter 93A down the line, but



1 I don't want to address that at this point, so let me -- let  
2 me discuss with you the legal elements of these three claims,  
3 and the law requires that you as jurors apply the evidence as  
4 presented during the course of the trial.

5 Under the general guidelines that I presented to you, you  
6 must apply the law -- the evidence to the law and determine  
7 what -- whether Mr. Spagnuolo was liable to Ms. Brooke-Petit  
8 for damages resulting from the breach of contract and/or fraud  
9 arising out of the construction services provided to the  
10 plaintiff, Brooke-Petit, but Mr. Spagnuolo.

11 Now, once you've considered all of Ms. Brooke-Petit --  
12 Petit's claims by apply the evidence presented in this case to  
13 the law, if you find Mr. Spagnuolo liable on any of these  
14 claims, you may award Ms. Brooke-Petit compensatory damages,  
15 and I'll define that a little more, but not punitive damages.  
16 Not punitive damages.

17 Let me shift to the subject of breach of contract. Breach  
18 of contract. Generally, a breach of contract is a failure to  
19 comply with one or more terms of a contract. A breach of  
20 contract is a failure to comply with one or more terms of the  
21 contract. In order to recover breach for contract, the non-  
22 breaching party, and that here is alleged to be Ms. Brooke-  
23 Petit, must have completely performed her obligations. Where  
24 one party to a contract has failed to perform her obligations,  
25 then as a matter of law, the other party is thereafter excused

1 from performing his contractual obligations.

2 Now, there are four elements that each of which must be  
3 proven to you. When you hear me say the word elements, think  
4 of this, that each element is -- is modified or define and you  
5 must find that element to be true by a preponderance of the  
6 elements -- evidence, in other words, more likely than not.  
7 So when I give you an element, and I'm going to say there's  
8 four elements to breach of contract, each one of those  
9 elements must be proven by -- to you to your satisfaction as  
10 the jury by a preponderance of the evidence, meaning more  
11 likely than not, so that standard of proof applies to each  
12 element. You get it.

13 There are four elements you must find.

14 One, there's a contract. Pretty simple.

15 Two, the -- I don't mean pretty simple that you can find  
16 that. I mean pretty simple in terms of what -- what you have  
17 to do, that there is a contract, and you have to find that.

18 Two, that the party performed its obligations under the  
19 contract or is excused from performance. So number two is  
20 performance of the obligations or excused from performance.

21 Three, that the other party breached the contract.

22 And, four, that the non-breaching party suffered damages as  
23 a result of the breach of contract.

24 So four things. One, breach of contract.

25 Two, that the party performed its obligations under the

1 contract or was excused from performing.

2 Three, the other party breached the contract.

3 And, four, that the non-breaching party suffered damages or  
4 harms or injuries or financial loss, whatever you want to call  
5 it. Damages is a -- kind of a vague word we use to mean like  
6 financial losses or harm or injury, some -- sometimes they  
7 refer to them as injury, but there's no -- no physical injury  
8 here, no personal injury like in a motor vehicle car case, a  
9 motor vehicle accident. It's -- we're talking about financial  
10 loss, is what we're really talking about. So those are the  
11 four elements.

12 Now, in Massachusetts let me tell you that there is an  
13 implied covenant of good faith and fair dealing between  
14 parties to a contract. It's an implied covenant of good faith  
15 and fair dealing to every -- every contract. The implied  
16 covenant of good faith, and fair dealing means that neither  
17 party may do anything that will have the effect of destroying  
18 or injuring the right of the other party to receive the fruits  
19 of the contract.

20 If the plaintiff has failed to act in good faith and has  
21 breached its implied covenant of good faith and fair dealing,  
22 the plaintiff cannot recover for subsequent breach of contract  
23 by the defendant.

24 So let's turn to the first element. Was there a contract?  
25 You must answer this question as to whether this contract or

1 agreement between Ms. Brooke-Petit and Mr. Spagnuolo as to the  
2 construction -- construction or remodeling project or services  
3 at 131 Timberlane Drive in Mashpee.

4 Now, what's a contract? A contract exists when the parties  
5 agree to the terms and conditions of mutual promises. It  
6 exists when the parties agree to the terms and conditions of  
7 mutual promises.

8 By the way, let me just add parenthetically, remember when  
9 we were kids, you'd -- you'd see -- hear these comedy  
10 routines, will the party of the first part and the party of  
11 the second part and all that stuff, actually that -- that's  
12 like about a hundred years ago. I still think that we're  
13 going to see a contract with those terms, but we don't -- we  
14 don't do that in case any of you are waiting for me to start  
15 talking that way.

16 So a contract exists when the parties agree to the terms  
17 and conditions of mutual promises. The contract may be based  
18 on oral or written promises. This is often referred to -- to  
19 as a meeting of the minds, a meeting of the minds.

20 Mutuality means that the parties communicated their  
21 agreement to the terms and conditions in the same sense and at  
22 the same -- at -- at the time of the alleged contract.

23 There's no contract formed if only one party intends to be  
24 bound or if the parties intend to be bound but only at a later  
25 date. Agreement can be shown by a written or spoken words,

1 written or spoken words, or by some act or omission which is  
2 intended to communicate agreement, and which indicates to the  
3 other party that it is intended to communicate agreement. The  
4 law presumes that a person intends the natural and probable  
5 consequences of his or her acts.

6 An unexpressed intent to be bound or contract doesn't  
7 create a binding contract.

8 In order to determine whether a binding contract existed in  
9 this case, decide whether the parties intended to be agreed by  
10 the contract's terms as of the time of the contract.

11 Now, the contract terms, that's number two. If you  
12 determine that a binding contract was formed, you must  
13 determine the terms of the contract. Now, the terms of the  
14 contract are those to which the parties mutually assented with  
15 reasonable certainty.

16 Let's move to the subject of the time for performance.  
17 When a contract doesn't specify the time for performance, a  
18 party has a reasonable period of time in which to perform, a  
19 reasonable period of which -- in -- of time within which to  
20 perform.

21 Let's talk about performance. When a contract requires the  
22 defendant to render performance to the satisfaction of the  
23 plaintiff, the standard of satisfaction is whether a  
24 reasonable person would be satisfied in view of all the  
25 circumstances, whether a reasonable person would be satisfied

1 in view of all the circumstances.

2 Let's talk about performance by the defendant. There can  
3 be no breach of contract where the defendant has fully  
4 performed. Where a plaintiff has accepted the benefit of the  
5 defendant's full performance, the plaintiff cannot be heard to  
6 complain about the performance.

7 Where a person or entity contracts to perform services for  
8 another, it implicitly promises to perform the services in a  
9 reasonably diligent, skillful, workmanlike, and adequate  
10 manner. So where a person contracts to perform services for  
11 somebody else, it implicitly promises to perform the services  
12 in a reasonably diligent, skillful, workmanlike, and adequate  
13 manner. The contract may be found to be breached if it was  
14 performed negligently.

15 A party cannot refuse to perform a contract in anticipation  
16 of a breach by the other party to a contract.

17 Let's talk about full performance. To cover -- to recover  
18 for a full -- for a breach of contract, a plaintiff, and here  
19 that's Ms. Brooke-Petit, must establish her full and complete  
20 performance of all obligations under the contract. However, a  
21 material breach of the contract by one party excuses further  
22 performance by the non-breaching party.

23 A material breach of the contract by one party excuses  
24 further performance by the non-breaching party.

25 If you find that the plaintiff, Ms. Brooke-Petit, had an

1 If the plaintiff has not proven that the defendant breached  
2 the contract, then you will not consider the issue of damages.

3 If the defendant, Mr. Spagnuolo, did breach the contract,  
4 you must then decide the amount of the plaintiff's damages, if  
5 any.

6 Before the plaintiff can recover damages under any theory  
7 of recovery, she must prove the defendant's breach caused  
8 those damages.

9 Now, the basic principle of contract damages is that the  
10 injured party should be put in as good a position as if the  
11 other party had fully performed its obligations under the  
12 contract. So the basic principle is to put the person in as  
13 good a position as if the other party had fully performed its  
14 obligations under the contract.

15 In order to recover damages against Mr. Spagnuolo, Ms.  
16 Brooke-Petit must demonstrate that the damages complained of  
17 were caused by Mr. Spagnuolo's conduct. Now, if the damages  
18 were caused by Ms. Petit or by somebody other than the  
19 defendant, the plaintiff, Ms. Petit, is not -- Brooke-Petit is  
20 not entitled to damages from Mr. Spagnuolo.

21 Now, Ms. Brooke-Petit is entitled to recover damages  
22 sufficient to give her the benefit of the contract bargain as  
23 long as those damages are reasonably proven. In other words,  
24 she's entitled to those damage that would put her in a  
25 position to obtain what she bargained to obtain, such as



1 compensation in money that can be computed by rational methods  
2 upon a firm factual basis.

3 Now, an injured party, Ms. Brooke-Petit here is alleged to  
4 have been that party, is entitled to recover both general and  
5 specific damages. What are general damages? Those which flow  
6 according to common understanding as the natural and probable  
7 consequence of a breach.

8 Consequential damages result from special circumstances  
9 known or presumed to have been known to the parties.

10 Now, in a construction contract, the measure of damages is  
11 where the builder fails to complete a construction job, and it  
12 should be measured by the difference between the value of the  
13 job -- of the work in disrepair and the value of the subject  
14 structure if satisfactorily completed according to the  
15 contract. So the measure of damages awarded in a construction  
16 contract should be, where the builder fails to complete a  
17 construction job should be measured by the difference between  
18 the value of the -- value of the work in disrepair and the  
19 value of the subject structure if satisfactorily completed  
20 according to the contract.

21 Now, let's move on to a subject, the subject of fraud. So  
22 we've completed our discussion on breach of contract. We move  
23 on to the allegation of fraud. And what are the elements of  
24 fraud? In this case, Ms. Brooke-Petit claims the defendant,  
25 Spagnuolo, misrepresented important facts including, but not



1 limited to, the cost to do the construction remodeling  
2 services at her home at Mashpee, the materials to be used, the  
3 subcontractor work, the payments made to them, and the actual  
4 construction or remodeling work done on the plaintiff's  
5 property which the plaintiff says she would not have done if  
6 she had known the true state of affairs. As a result, Ms.  
7 Brooke-Petit claims that she was financially harmed.

8 Mr. Spagnuolo, for his part, denies that he misrepresented  
9 any important fact to Ms. Brooke-Petit.

10 Ms. Brooke-Petit may recover money damages from Mr.  
11 Spagnuolo if and only if she proves by a fair preponderance of  
12 the evidence, meaning again more likely than not by credible  
13 evidence, the following five factors. So five elements to a  
14 fraud claim. Five elements to a fraud claim.

15 One, that Mr. Spagnuolo made a false statement or  
16 statements to the plaintiff, and that statement or -- or those  
17 statements concerned some fact that a reasonable person would  
18 consider important to the decision that the plaintiff was  
19 about to make. So fact number -- I mean element number one is  
20 that the defendant, Mr. Spagnuolo, made a false statement or  
21 statements to the plaintiff -- plaintiff and that statement or  
22 those statements concerned some fact that a reasonable person  
23 would consider important to the -- to the decision that Ms.  
24 Brooke-Petit was about to make.

25 Now what is a -- a material fact? A material fact -- now,

1     you'll hear me -- hear me use -- hear me use that word  
2     material a couple more times. A material -- material fact is  
3     a fact that a reasonable person would attach importance to in  
4     determining his or her choice of action in the transaction. A  
5     fact is material if a reasonable person would attach  
6     importance to it in determining his or her choice of action in  
7     the transaction in question.

8     Two, the second element that again -- again must be proven  
9     by a preponderance of the evidence is that when Mr. Spagnuolo  
10    made the statement, the defendant either knew that the  
11    statement was false or recklessly made the statement by  
12    willfully disregarding its truth or falsity. So two is that  
13    when Mr. Spagnuolo allegedly made the statement, he knew  
14    either that the statement was false or he recklessly made the  
15    statement by willfully disregarding its truth or falsity.

16    Third element, Mr. Spagnuolo made the false statement with  
17    the intention that the plaintiff would rely on that statement  
18    in making her decision. So three is that -- it is called  
19    reliance. That's where the -- Mr. Spagnuolo allegedly made  
20    the false statement with the intention that Ms. Brooke-Petit  
21    would rely on that statement in making her decision.

22    Four, that in making her decision, Ms. Brooke-Petit did in  
23    fact rely upon the defendant's statement as true and that all  
24    -- her reliance was reasonable under the circumstances.

25    And, five, that the plaintiff suffered some financial loss

1 as a result of relying on the defendant's false statement.

2 So usually the -- the last element in each one of these  
3 theories of recovery is that you have to show damages, and  
4 they have to -- financial damages, and they have to be related  
5 to the -- to the actions of the defendant. That's always --  
6 almost always last -- the last element. I think it is the  
7 last element.

8 So if the plaintiff has proven these five elements by a  
9 preponderance of the evidence, your verdict will be for the  
10 plaintiff, and you must then go on to determine the amount of  
11 money damages to be awarded her.

12 If the plaintiff has failed to prove any one of these five  
13 elements, then your verdict must be for the defendant.

14 Now, before I move further -- off of discussion for that,  
15 does anybody want me to define any of these elements again? I  
16 -- there's no harm here. No -- no harm, no foul we used to  
17 say. No? Okay.

18 All right. So let's talk about a false statement --  
19 anybody? No. Okay.

20 False statement of fact, the defendant can be held  
21 responsible for an intentional or a reckless misrepresentation  
22 about an existing fact. A fact, as opposed to an opinion,  
23 estimate, or intention, is a statement whose truth or falsity  
24 is capable of being determined with certainty. Generally, Mr.  
25 Spagnuolo cannot be held responsible for a statement about a

1 future event, although there is an exception to that rule if  
2 the defendant had greater expertise about a particular future  
3 -- future event that was being discussed.

4 Mr. Spagnuolo can be held responsible for a  
5 misrepresentation about his opinion, his estimate or  
6 intention, but only if he intentionally misrepresented his  
7 opinion, estimate or intention.

8 Let's talk about false statements of facts or opinions.  
9 Fraud may be perpetrated by an implied as well as by an  
10 expressed representation. Fraud may be perpetrated by an  
11 implied as well as by an expressed interpretation --  
12 representation, excuse me. A statement that in form is one of  
13 opinion in some circumstances may be reasonably interpreted by  
14 the recipient or listener to imply that the maker of the  
15 statement knows facts that would justify the opinion. In this  
16 case, it's for you as the jury to determine whether the  
17 statement made by Mr. Spagnuolo was one of fact or opinion.

18 Now, let's talk about false statements and the nature of  
19 half-truths and silence or conduct or statements calculated to  
20 mislead. Mr. Spagnuolo can be held responsible not only for  
21 outright untrue statements but also for giving misleading,  
22 partial information or for telling half-truths. The defendant  
23 cannot, however, be held responsible to the plaintiff based  
24 solely on his silence about a matter about which he wasn't  
25 asked.

1 Now, although Mr. Spagnuolo has -- was under no duty to  
2 volunteer information, if -- if he spoke on a given point,  
3 either voluntarily or at the plaintiff's request, he must have  
4 spent -- then spoken honestly and must have divulged all  
5 material facts about which he knew that bore upon the subject.

6 Additionally, deception need not be direct to come within  
7 the reach of the law. If you find that the defendant's  
8 statements and conduct combined were calculated to mislead the  
9 plaintiff and that they did in fact mislead her and that the  
10 plaintiff was acting reasonably, then this is enough to  
11 constitute intentional misrepresentation.

12 Let's shift for a moment to talk about to known --  
13 knowledge of falsity and willful disregard of truth or  
14 falsity. Mr. Spagnuolo is liable if he made a false statement  
15 of fact knowing it to be false. Likewise, if he made an  
16 unqualified statement about facts, the truth or falsity of  
17 which he could've determined with certainty and gave Ms.  
18 Brooke-Petit -- Brooke-Petit the reasonable impression that he  
19 was speaking of his knowledge, than Mr. Petit -- Mr. Spagnuolo  
20 is not excused from liability if he didn't in fact know  
21 whether the statement was true or false. The law regards such  
22 willful disregard of the facts as equivalent to an intentional  
23 misrepresentation. Actual intent to deceive need not be  
24 proven.

25 Now, the plaintiff must prove that the defendant intended

1 that the plaintiff would rely on the misrepresentation and  
2 that reliance, as I said before, must be reasonable. So what  
3 are we talking about? As I say, plaintiff must prove that she  
4 relied upon his misrepresentation and misrepresentation is  
5 material. If it is shown that the misrepresentation was one  
6 of the principle grounds, although not necessarily the sole  
7 ground or only ground, that caused Ms. Brooke-Petit to take  
8 the particular action that the defendant intended her to take  
9 as a result of the representations and that otherwise, Ms.  
10 Brooke Petit wouldn't have taken such action.

11 Furthermore, Ms. Brooke-Petit may recover only if her  
12 reliance on the defendant's statement was reasonable and  
13 justifiable under the circumstances. Ordinarily, Ms. Brooke-  
14 Petit, as a plaintiff, is not required to investigate the  
15 truth of assertions that were made to her. The recipient of a  
16 fraudulent misrepresentation of fact is ordinarily justified  
17 in relying on its truth, although she might have ascertained  
18 that the falsity of the representation had she made an  
19 investigation.

20 If the defendant's representations were such so as to  
21 induce the plaintiff not to undertake an independent in --  
22 examination of the pertinent facts, lulling her into placing  
23 confidence into his insurances, then her failure to ascertain  
24 the truth through investigation doesn't preclude recovery.  
25 This is so even though the defendant, Mr. Spagnuolo's,

1 representations were not conspicuously false.

2 And I remind you that if you do reach the issue of -- of --  
3 of damages in this -- in this regard on the fraud elements  
4 just as you did on -- on -- just as you're going to entertain  
5 that exercise of looking at each of the elements and the  
6 breach of contract, remember there's five elements, each of  
7 which have to be proven by a preponderance of the evidence in  
8 the fraud area. You're not to engage in punitive damages, but  
9 you are to award the plaintiff an amount of money that's the  
10 difference between the value of the work in disrepair and as  
11 misrepresented by the defendant and the value of the structure  
12 if satisfactorily completed according to the agreement and/or  
13 the misrepresentations not having been made by the defendant.

14 In other words, if you reach the issue of damages, award  
15 Ms. Brooke-Petit a sufficient amount of money to put her in  
16 the position that she would've been in if the situation had  
17 been as represented by the plaintiff -- by the defendant.

18 In other words, you award her the benefit of the bargain or  
19 the benefit of the contract with the defendant if those  
20 damages are proven with reasonable certainty, and mathematical  
21 precision is not required.

22 If the misrepresentation caused the plaintiff incur -- to  
23 incur any additional expenses that were reasonably foreseeable  
24 as a result of Mr. Spagnuolo's misrepresentation then you're  
25 to award Ms. Brooke-Petit an additional amount of money that



1 will compensate her for those additional expenses she  
2 incurred.

3 So we've now covered the breach of contract and the fraud  
4 claims. Let me move onto the sub -- to the subject of the  
5 home improvement contractor statute. That is Chapter 142A of  
6 the general laws.

7 Now, what are -- what kind of properties are governed by  
8 this statute? Well, a homeowner's house was -- let me --  
9 let's -- let's define owner under the statute. We are talking  
10 about the homeowners -- the homeowner. So what do we mean by  
11 the owner? Well, owner is defined under the law as any  
12 homeowner of a preexisting owner occupied building containing  
13 at least one or not more than four dwelling units who orders,  
14 contracts, or purchases the services of a contractor or  
15 subcontractor. So what is an owner? It's defined under the  
16 statute as any homeowner of a preexisting owner occupied  
17 building containing at least one or not more than four  
18 dwelling units who orders or contracts or purchases the  
19 services from a con -- subcontractor or contractor.

20 Now, the case law, this -- this is the statute. It's right  
21 here. That's the statute. Chapter 142A.

22 And I've just read to you the definition right from --  
23 well, excerpted from -- from section one in that -- chapter --  
24 section one of that all define -- defines different words  
25 including the word owner. So there was a case that further



1 delineated or defined what the word homeowner means. What is  
2 a homeowner?

3 Well, a homeowner's house was preexisting, owner occupied  
4 building under the statute even though the homeowner never  
5 lived in that house where the remodeling was performed where  
6 the house was a preexisting building and the owner brought it  
7 to -- bought it to live in. All right? So that is not  
8 defined in the statute that way, but the case -- a case came  
9 up to the Supreme Judicial Court, this one -- this -- it's in  
10 this one here. A case came up to -- actually, it came up to  
11 the Appeals Court and then they said well do you have to -- do  
12 you have to immediate live in it? Do you have to be living in  
13 it at the time? And they said no, you don't have to be living  
14 in it at the time. A homeowner's house was a preexisting  
15 owner occupied building under the statute although the  
16 homeowner never -- homeowner never lived in the house where  
17 the remodeling was performed where the house was a preexisting  
18 building, what it a preexisting building, and the owner bought  
19 it to live in. Okay? So that defines homeowner for -- owner  
20 for you.

21 Chapter 142A, section two requires that in every agreement  
22 to perform residential contracting services for an amount in  
23 excess of a thousand dollars has to be in writing and contain  
24 the following relevant information.

25 I'm going to -- I'm going to go through these rather

1       speedily, not speedily but expeditiously.

2       The first thing is the identity of the people, their full  
3       names, their socials, addresses, names of the contractor, and  
4       so forth, and the date that the contract was executed between  
5       the parties. That's fairly obvious. It identifies the  
6       people, the dates, and the -- the names of the people and  
7       their addresses.

8       The next thing is the dates under which the contract is  
9       scheduled to perform and the date that it is supposed to be  
10      completed substantially.

11      The third thing is a time schedule of payments to be made  
12      under the contract and the amount of each payment stated in  
13      dollars including finance charges and any deposit that's  
14      required under the contract to be paid in advancement of the  
15      commencement of work shall -- shall not exceed the greater of  
16      one third of the total contract price or the actual cost of  
17      any materials or equipment of a special order or custom made  
18      nature which must be ordered in advance of the project in  
19      order to assure that the project will proceed on schedule.

20      No final payments shall be demanded until the contract is  
21      completed to the satisfaction of the parties. There also need  
22      be -- needs to be a clear and conspicuous notice appearing on  
23      the contract that all contractors or subcontractors must be  
24      registered and that any inquiry about a contractor or  
25      subcontractor relating to registration should be directed to

1 the administrator. We're talking about in this -- in this  
2 instance, the chief administrator of the board of building  
3 regulations of the executive office of state or executive  
4 office of public safety.

5 And also, there should be a registration number of the sub  
6 or the contractor on the contract.

7 All this have to be in ten point bold type or larger  
8 directly above the space provided for the signature.

9 Chapter 142A, Section 17 prohibits the following acts by  
10 contractors. It prohibits the following acts by contractors.

11 One, abandoning or failing to perform without justification  
12 any contract or project engaged -- engaged in or in  
13 undertaking by a registered contractor or subcontractor or  
14 deviating from or disregarding plans or specs in any material  
15 respect without the consent of the contractor or of the owner,  
16 excuse me.

17 Two, failing to credit to the owner any payment that have  
18 been made to the contractor in connection with a residential  
19 contract.

20 Three, making any material misrepresentation in the  
21 procurement of the contract or making any false promise of a  
22 character likely to influence, persuade, or induce the  
23 contract.

24 And lastly, fourth, violating any building law of the  
25 Commonwealth or any of its cities or towns.

1       So there's four elements that -- four prohibited acts by  
2       the -- by the home improvement statute.

3       One is abandoning or failing to perform without  
4       justification any contract or project.

5       Two is failing to credit payments that have been made to  
6       the owner by the -- to the contractor by the owner.

7       Three is making any material misrepresentation is the  
8       procurement of the contract or making any false promise of  
9       contract -- of a character likely to influence or persuade or  
10      induce the contract.

11      And, four, is the violation -- any violation of the  
12      building code of the laws of the Commonwealth or any city or  
13      town.

14      Now, a violation of any of these provisions shall  
15      constitute an unfair or deceptive act under the provisions of  
16      Chapter 93A, and I'm going to -- in other words, it -- it  
17      flips you to the next inquiry. The next line of inquiry is  
18      onto Chapter 93A, and we'll talk about that in a moment. But  
19      let me repeat, a violation of any of those provisions shall  
20      constitute an unfair or deceptive act under the provisions of  
21      Chapter 93A.

22      If you find that Chapter 142A was violated by Mr.  
23      Spagnuolo, then you must find that there was a violation of  
24      Chapter 93A.

25      Now, as far as what you do with that violation, that's

1 another level of inquiry, and we'll talk about that in a  
2 moment, but only if you find that there was a violation of the  
3 home improvement contract, you must find that there was a  
4 violation of Chapter 93A, and I emphasize thereafter.  
5 Entirely, it's up to you as to what you do if you do find a  
6 violation of the home improvement contractor to translating to  
7 what to do on the 93A, and I'll -- I'll go through that in a  
8 moment.

9 So now we shift to the last subject area and that is the  
10 unfair or deceptive acts or practices. And before we do that,  
11 we're going to take a -- a one minute break. Does anybody  
12 need any water? I'm getting a little dry here.

13 We're on the five yard line, so -- with Tom Brady. Not me,  
14 but Tom Brady, or what's the guy from Minnesota -- Minnesota --  
15 - no, the guy who retires all the time.

16 UNIDENTIFIED ATTORNEY: Brett Favre.

17 THE COURT: Brett Favre. That's a guy that doesn't know  
18 when to hang up the cleats, huh? He's retired five times in  
19 the last whatever.

20 All right. So Chapter 93A which is the Mass -- called the  
21 Massachusetts Consumer Protection Act. It outlaws certain  
22 acts, unfair acts or -- of competition or unfair -- unfair  
23 methods of competition or unfair and deceptive acts or  
24 practices in the conduct of trade or commerce.

25 Now, what does trade or commerce mean? It means the

1 advertising, offering for sale or rent or lease to sale, rent  
2 or lease of services and/or property or any other thing of  
3 value. So it's the -- the sale or rent or lease of any  
4 services or any other property.

5 To show a violation of Chapter 93A, Section 9, Ms. Brooke-  
6 Petit must prove, one, that she's been injured by some act or  
7 practice of Mr. Spagnuolo.

8 Two, that the act or practice was done in the conduct of  
9 any trade or commerce.

10 Three, the act or practice is unfair or deceptive.

11 And, four, that at least thirty days before the filing of  
12 the suit, she sent a demand letter in writing for relief that  
13 identified herself and reasonably described the unfair or  
14 deceptive act or practice and the injury, financial injury,  
15 that she suffered.

16 So let me -- let me reiterate. There are four elements  
17 that must be proven under a Chapter 93A violation that she has  
18 been injured by some act or practice of the defendant.

19 Two, that the act or practice was done in the conduct of  
20 any trade or commerce.

21 Three, that the act or practice is deceptive or unfair.

22 And, four, that she issued a thirty -- a pre suit demand at  
23 least thirty days before the lawsuit identifying in writing to  
24 the defendant the relief that she requests, identifying  
25 herself and reasonably describing the unfair or deceptive act

1 or practice and the injuries suffered.

2 Now, if the plaintiff, Ms. Brooke-Petit, wishes to recover  
3 more than the minimum of twenty-five dollars under the  
4 statute, she must also prove the amount of damages that  
5 proximately resulted from the defendant's unfair or deceptive  
6 act or -- or practice. If she wishes to recover double or  
7 triple damages, double or triple damages, the plaintiff must  
8 additionally prove either that the act or practice was a  
9 willful or knowing violation of the law or that Mr.  
10 Spagnuolo's refusal to grant relief on demand or after demand  
11 was made in bad faith with the knowledge or reason to know  
12 that the act or practice complained of violated the law.

13 So if the plaintiff wishes to recover double or treble  
14 damages -- remember I talked to you about compensatory damages  
15 earlier? This is a little different. This is the double or  
16 treble damages provision of Chapter 93A. If the plaintiff  
17 wishes to recover double or treble damages, the plaintiff must  
18 additionally prove either that the act or practice was a  
19 willful or knowing violation of the law or that the defendant,  
20 Mr. Spagnuolo's, refusal to grant relief after the written  
21 demand was made was made in bad faith with knowledge or reason  
22 to know that the act or complaint -- or practice complained of  
23 violated the law.

24 Now, I'm going to present to you the law of -- on each of  
25 these elements.

1 First, let's talk about the demand letter. Somebody has to  
2 send a letter in -- in -- just to kind of put people on notice  
3 and find out what their reaction is. Maybe they can resolve  
4 it. I don't -- you know, I don't know.

5 The first element that the plaintiff must prove by a  
6 preponderance of the elements is that she mailed or delivered  
7 an adequate demand letter to the defendant at least thirty  
8 days before the action. This action was known -- was filed on  
9 November 20<sup>th</sup>, 2006. So it has to be filed before that --  
10 thirty days before that date of November 20<sup>th</sup>, 2006.

11 Now, what does adequate mean? It means that it identifies  
12 the plaintiff as the claimant. It reasonably describes the  
13 act -- unfair or deceptive act or practice. It reasonably  
14 describes this injury. It specifies what the relief is  
15 sought, and it includes at least one of the following  
16 indication that the plaintiff is seeking relief under the  
17 Chapter 93A, it refers to Chapter 93A, it refers to the  
18 Consumer Protection Act, it asserts that Ms. Brooke -- Brooke-  
19 Petit's rights as a consumer have been violated, it asserts  
20 that the plaintiff was pursue -- will pursue multiple damages  
21 and attorney's fees should be -- should -- if relief is award  
22 -- is denied, should the -- if the defendant fails to offer  
23 relief, and finally, it con -- must contain an assertion that  
24 the defendant acted in an unfair or deceptive manner.

25 Now, as I said before, Ms. Brooke -- Brooke-Petit must



1 prove by a preponderance of the evidence, meaning more likely  
2 than not, Mr. Spagnuolo was engaged in truth to commerce in  
3 his dealings with her. That -- in other words, that it took  
4 place in a business context. Trade or commerce includes, as I  
5 said before, the offering of services. This definition is  
6 rather open ended.

7 Plaintiff is claiming in her dealings with the -- Mr.  
8 Spagnuolo that she participated in a private, non-professional  
9 basis. The plaintiff has the burden of proving by a  
10 preponderance of the evidence that she was a private, non-  
11 person -- non-professional person such as a consumer or that  
12 although she was a business person, in the context of this  
13 case, the defendant, Mr. Spagnuolo, dealings with her did not  
14 occur in connection with her business.

15 The term unfair or deceptive is un -- is broad and flexible  
16 and it is intentionally so defined. Use your common sense.

17 Based on the jury instructions that I'm now giving you,  
18 consider whether Mr. Spagnuolo took unfair advantage of Ms.  
19 Brooke-Petit and whether she was defenseless as a consumer.  
20 Consider the defendant's conduct in light of all the  
21 circumstances.

22 Now, a deceptive act or practice is one simply that had the  
23 capacity to deceive. An act or practice is deceptive if were  
24 -- if it could reasonably cause a person to act differently  
25 from the -- from the way the person, meaning the plaintiff

1 here, would act if she had known the truth. It -- it includes  
2 any communication made with the intent to deceive another  
3 person; however, an intent to deceive is not always necessary.  
4 A negligent or careless misrepresentation of fact, the truth  
5 of which was reasonably capable of ascertainment may also be a  
6 deceptive act or practice.

7 To help you decide whether an act or practice is unfair,  
8 ask yourself three simple questions. Unfair question -- three  
9 simple questions.

10 First, does it fall in the -- some established concept of  
11 unfairness? For something to be unfair, it doesn't need to  
12 violate the law or some government regulation, but that is if  
13 there is such a violation, something for you to consider, but  
14 not every illegal act is unfair.

15 Second, ask yourself whether the defendant's act or  
16 practice was immoral or unethical, oppressive, unscrupulous,  
17 or otherwise unconscionable.

18 Remember that you must decide this question in the context  
19 of the commercial -- context of the commercial marketplace  
20 where, on the one hand, people don't expect to be cheated, but  
21 on the other hand, they should expect to deal with each other  
22 prudently and not at -- and -- and at arm's length, prudently  
23 and at arm's length.

24 Third, consider whether the defendant, Mr. Spagnuolo's, act  
25 or practice would cause substantially injure -- substantial

1 injury to the public or consumers in general.

2 Now, if -- if Mr. Spagnuolo's actions were unfair or  
3 deceptive, then go on to decide whether Mr. Spagnuolo  
4 willingly or knowingly committed that unfair or deceptive act  
5 or practice.

6 Ms. Brooke-Petit has the burden of proving by a fair  
7 preponderance of the evidence that the defendant had a sub --  
8 subjectively culpable state of mind.

9 Willful or knowing requires something more than mere  
10 negligence.

11 An unfair or deceptive statement is willful if the speaker  
12 represents a fact to be true without knowing whether it is  
13 true or not, and with false -- and with reckless disregard for  
14 whether it's true or not.

15 An unfair or deceptive statement is knowing if the speaker  
16 represents the fact to be true while knowing that it's not  
17 true.

18 An unfair or deceptive act or practice is willful if the  
19 person intends to commit an unfair or deceptive act. An  
20 unfair or deceptive act is knowing if the person, whatever his  
21 or her intent, knows that by doing so, he's committing an  
22 unfair or deceptive act.

23 Let's move on to the subject of injury, then damages, and  
24 then we're done.

25 If the defendant, Mr. Spagnuolo, committed an unfair or

1 deceptive act or practice, you must then determine whether Ms.  
2 Brooke-Petit was injured or damaged, more properly damaged is  
3 the word, by the defendant, Spagnuolo's, actions.

4 In deciding whether Ms. Brooke-Petit was injured, you may  
5 consider whether the plaintiff sustained any loss of money or  
6 property or -- or emotional upset as a result of the  
7 defendant's actions.

8 While the plaintiff need not prove actual reliance upon a  
9 misrepresentation by Mr. Spagnuolo, in order to recover  
10 damages, she must prove a causal connection between the  
11 deception and the loss and that the loss was foreseeable as a  
12 result of the deception.

13 Finally, if Mr. Brooke-Petit -- excuse me. If Mr.  
14 Spagnuolo engaged in an unfair method of competition or used  
15 an unfair or deceptive act or practice, Ms. Brooke-Petit has  
16 the right to be compensated for any loss or property -- a loss  
17 of money or property she suffered in reaching your decision  
18 and determining what loss she suffered, the -- the term money  
19 means money. It doesn't mean time or anything else. Have in  
20 mind the term property means the kind of property that's  
21 purchased or leased, not intangible such as the right to -- a  
22 sense of security or peace of mind or personal liberty. Those  
23 things don't -- don't -- don't apply.

24 What you're deciding at this point is what amount of money  
25 will fairly and fully compensate Ms. Brooke-Petit for the

1 losses that Mr. -- Ms. Brooke-Petit sustained allegedly as a  
2 result of Mr. Spagnuolo's conduct.

3 Now, if you find that Mr. Spagnuolo committed an unfair or  
4 deceptive act or practice willfully or knowingly, then Ms.  
5 Brooke-Petit is entitled to an award of up to three times, but  
6 no less than two times, the actual damages you've determine  
7 the plaintiff, Ms. Petit -- Ms. Brooke-Petit to have  
8 sustained. Let me repeat that. If you find that Mr.  
9 Spagnuolo has committed an unfair and deceptive act or  
10 practice willfully or knowingly, then the plaintiff is  
11 entitled to an award of up to three times but no less than two  
12 times the actual damages you have determined the plaintiff,  
13 Ms. Brooke-Petit, to have sustained.

14 You must, therefore, determine whether the damage caused by  
15 Mr. Spagnuolo's unfair or deceptive act or practice should be  
16 doubled or tripled. Multiple damages are designed to impose a  
17 penalty on a defendant. The purpose of multiple -- multiple  
18 damages is to -- is to deter callous and intentional  
19 violations of the law and to promote prelitigation settlements  
20 by making it unprofitable for a defendant to ignore a  
21 plaintiff's request for relief. Multiple damages are not  
22 awarded to compensate particular harmed individuals.

23 In determining whether the actual damages should be doubled  
24 or tripled, take into consideration all of the relevant  
25 circumstances including the character and degree of the wrong

1 as shown by the evidence, the necessity of preventing similar  
2 wrongs, and the defendant's degree of culpability.

3 Let me go through you -- with you, if I may, the jury  
4 verdict slip, and if I could have counsel -- Martha, if you  
5 wouldn't mind giving these to Joanne and counsel to -- these -  
6 - this is -- these are two to counsel and these go to the  
7 jury.

8 Thank you.

9 I'm going to hand out the special jury verdict slip form.

10 All right. Do we have -- by the way, do we have -- do we  
11 have a foreperson?

12 THE CLERK: Yes, your Honor.

13 THE COURT: Who is that?

14 THE CLERK: Juror in seat number thirteen, Mr. Shaughnessy.

15 THE COURT: All right. Mr. Shaughnessey, would you mind  
16 taking that obligation on you?

17 JUROR NUMBER: No problem.

18 THE COURT: All right. Thank you. There's special pay in  
19 it for you. You can have an extra sandwich or something, I  
20 don't know.

21 All right. So the just -- special jury verdict slip, let  
22 me -- let me run through this with you.

23 Did the plaintiff and the defendant enter into a or -- an  
24 oral or a written agreement or contract?

25 Does everybody have one? No, not yet. I'm sorry.

1       Okay. All right.

2       Did the plaintiff and defendant enter into an oral or  
3       written agreement or contract -- slash contract pursuant to  
4       which the defendant agreed to provide or require -- provide  
5       remodeling construction services, materials, and supplies, and  
6       the plaintiff agreed to pay for those services as they were  
7       provided? Yes or no. If you answer yes, then you go onto  
8       question two. If you answer no, then go to question three.  
9       All of these directions done, they -- they -- they channel you  
10      into certain directions based on your decision.

11      Now, I'm going to tell you that in each one of these  
12      questions that you're going to be -- be addressing must be  
13      answered by -- by ten of the twelve people satisfact -- in --  
14      in -- in -- to the same answer. In other words, you -- you  
15      need -- there are fourteen of you. We're going to take out  
16      two of you as -- as alternates in a few moments, so twelve of  
17      you will be sitting as jurors. Two unfortunately will be  
18      selected as alternates, but you'd be surprised the number of  
19      times that alternates come into the breach. Probably one out  
20      of every four or five cases, the alternates -- somebody gets  
21      sick, they have to go home, elderly parents, sick kids, they  
22      get sick themselves, and so we have to throw an alternate into  
23      the -- into the fray.

24      So alternates, stand by.

25      So in any event, let me -- let me -- that's question -- so

1 any of these questions that you're going to be -- every --  
2 every of these questions that you're going to be allowed --  
3 asked to address must be answered in -- in -- in -- in the  
4 tune of ten people agreement. The ten people that constitute  
5 that number can change from each question. It doesn't have to  
6 be the same ten people, but it has to be the magic number of  
7 ten.

8 So question two is did the -- did the defendant breach the  
9 oral or written agreement or contract with the plaintiff by  
10 failing to provide the services contracted for or by over --  
11 over charging the plaintiff?

12 So then you go on to question three, fraud, and that's --  
13 remember I defined fraud for you? Did the defendant commit  
14 fraud, deceit, and or misrepresentation by any means in  
15 connection with the services provided?

16 Now, if you answer that yes, you go onto four. If you  
17 answer it no, then you go on to question six because roman  
18 numeral three is the Chapter 142A section that we talked  
19 about. That's the home improvement contract, so this is  
20 following the instructions that I went to. First was the  
21 contract issue, roman numeral one, two is the fraud issue, and  
22 the three is the home improvement contract.

23 So did the defendant, in question four, violate Chapter  
24 142A regarding the regulation of home improvement contractors  
25 by any means in connection with the services provided by the



1 defendant to the plaintiff?

2 Now, if you answer that yes, you go on to the five. If you  
3 answer it no, then you jump to six.

4 If you answer five yes, then you ask -- then you answer  
5 what amount of money would fully and -- and fairly compensate  
6 the plaintiff for any injury or damage she sustained because  
7 of the defendant's conduct based on your answers to question  
8 one through four.

9 Let me just take a look at that.

10 It's not correct.

11 Yeah, I think that -- that has to be modified. If you  
12 answer the questions one -- no, we'll -- we'll go through  
13 that. I think that direction has to be changed a little bit,  
14 doesn't it?

15 UNIDENTIFIED ATTORNEY: Yes.

16 UNIDENTIFIED ATTORNEY: Yes, your Honor. I was just looking  
17 at it, and it --

18 THE COURT: Yeah, I -- I just caught it myself. If -- if --  
19 so if your answer to question number -- let's see. How do we  
20 modify that?

21 UNIDENTIFIED ATTORNEY: I think, your Honor, there's two on  
22 page two that need to be -- the references need to be changed.

23 THE COURT: Two. All right. Well, you know, we'll -- we'll  
24 go through those directions in a few minutes, but let me just  
25 get the questions, and then we'll correct it, and I -- I -- I

1 thank you. It's always good to have another set of eyes.

2 So what amount of money would fully and fairly compensate  
3 the plaintiff for any injury or damage she sustained because  
4 of the defendant's conduct based on your answers to one  
5 through four, but that -- that we're going to have to -- we're  
6 going to have to give you different instructions.

7 Now, we go on to roman numeral four and -- on Chapter 93A  
8 which is the unfair violation -- unfair or deceptive act or  
9 practice.

10 If your answer to number five is yes, that's the one of  
11 home improvement, that's going to be the one on home  
12 improvement contract. It's going to be actually question four  
13 -- we'll correct this for you -- you must find that there was  
14 a violation of General Laws Chapter 93A, and then you may  
15 award the plaintiff double or triple the amount awarded to the  
16 plaintiff in response to question five.

17 Therefore, what amount of money do you award the plaintiff  
18 as a result of the violation of the home improvement contract  
19 of which amount can either be a doubling or trebling -- or  
20 tripling of the amount awarded.

21 Then, we go on to the Chapter 93A. Did the plaintiff send  
22 an adequate demand letter to the defendant at least thirty  
23 days before November 20<sup>th</sup>, 2006? If your answer is yes to A,  
24 then you go on to 7B. If your answer is no, then you stop,  
25 notify the Court Officer, sign the jury verdict slip, and

1 return to the courtroom.

2 7B is was the defendant engaged in trade or commerce when  
3 he entered into the contract with the plaintiff, etcetera,  
4 etcetera, etcetera.

5 C, did the -- did the defendant act unfairly or deceptively  
6 when he entered into that agreement with the plaintiff?

7 And then D, did the act -- unfair or deceptive acts that  
8 the defendant engaged in cause injury or -- or loss to the  
9 plaintiff?

10 If you find a violation of Chapter 93A, you may award the  
11 plaintiff double or treble the amounts awarded to the  
12 plaintiff in response to question five. And we may adjust  
13 that.

14 What amount of money do you award to the plaintiff as a  
15 result of the defendant's violation of Chapter 93A? And that  
16 amount can be either double or triple.

17 Now, what we're going to do is I -- I see a couple of  
18 things that we need to correct on -- on the directions of  
19 these questions and the question numbers that I referred to in  
20 the directions.

21 So that's the general thrust of what we -- we need you to  
22 decide. It's long. It's not terribly complicated, but spend  
23 your time -- take your time on these things. It's not a rush  
24 to judgment. As these -- as these -- this case, as you well  
25 know, has taken several years to get to this point, and it's

1 no reflection on the parties by any stretch of the  
2 imagination. It's just a reflection that the Courts really  
3 need to do their jobs better.

4 So it's not their faults, but the point is that we've --  
5 we've spent several days doing this. We'd like you to have a  
6 full and measured discussion of the issues.

7 Along those lines, let me tell you that everybody has a  
8 voice, and everyone has a vote including the foreperson, so  
9 it's not like you break ties or anything like that.  
10 Obviously, there's twelve people. There's not -- probably not  
11 going to be any ties, but --

12 Who are our alternates, Martha?

13 We'll have Lynn.

14 THE CLERK: Want Lynn to draw?

15 THE COURT: Lynn draws.

16 THE CLERK: You draw.

17 THE COURT: You just need to select two.

18 THE CLERK: The juror in seat number four, Ms. Colden or Ms.  
19 Colben, and the juror in seat number nine, Tescassi.

20 Thank you.

21 THE COURT: All right. So the -- those -- they will be  
22 alternate jurors, and just stand by. We'll put you in a  
23 separate room, and you can just sit -- well, we'll get you  
24 some lunch in any event.

25 Did lunch come yet?

1 THE CLERK: No. 11:30 it should --

2 THE COURT: Okay. All right.

3 We -- we have -- we've got lunch coming in for you any  
4 minute, so you can do that.

5 Let me -- let me see counsel at sidebar, and then we'll --  
6 and in the meantime, what I'm going to ask you to do is if you  
7 wouldn't mind just -- wait -- wait, please.

8 Would -- would you mind -- no, the lawyers are okay.

9 Joanne, would you mind collecting these from the jurors so  
10 that we can correct these -- these citations to the different  
11 questions.

12 (DISCUSSION AT SIDEBAR)

13 THE COURT: (Inaudible at 01:56:15, low audio at sidebar.)

14 On the jury instructions, any issues?

15 UNIDENTIFIED ATTORNEY: I -- I do have one, your Honor.

16 THE COURT: Yeah.

17 UNIDENTIFIED ATTORNEY: And -- and I mean this very  
18 respectfully --

19 THE COURT: Yeah, that's -- it's fine. Respect or none, the  
20 trial (inaudible at 01:56:35, low audio at sidebar.)

21 One thing?

22 UNIDENTIFIED ATTORNEY: Yes.

23 THE COURT: Okay.

24 UNIDENTIFIED ATTORNEY: When you --

25 THE COURT: (Inaudible at 01:56:49, low audio at sidebar.)

1 UNIDENTIFIED ATTORNEY: (Inaudible at 01:56:51, low audio at  
2 sidebar.)

3 UNIDENTIFIED ATTORNEY: Well, the -- the important thing is  
4 -- is that, you know, it does -- it does give you the benefit  
5 of (inaudible at 01:57:25, low audio at sidebar.)

6 THE COURT: Well, where -- where does it say that it has to  
7 be (inaudible at 01:59:20, low audio at sidebar.)

8 UNIDENTIFIED ATTORNEY: (Inaudible at 01:58:31, low audio at  
9 sidebar.)

10 THE COURT: The facts of that case.

11 UNIDENTIFIED ATTORNEY: (Inaudible at 01:58:41, low audio at  
12 sidebar.)

13 THE COURT: (Inaudible at 01:58:45, low audio at sidebar)  
14 has to be intended for uses of owner occupied dwelling, and I  
15 don't think it has been.

16 (END OF DISCUSSION AT SIDEBAR)

17 THE COURT: Could -- could folks keep it down? I don't know  
18 who -- this is like a key part of the case here, so let's just  
19 cool it.

20 (DISCUSSION AT SIDEBAR)

21 THE COURT: Go ahead. I think it's a parenthetical  
22 observation. I don't think it's -- it's defined as soon as the  
23 work was done, but someone can -- it's like someone  
24 registering (inaudible at 01:59:43, low audio at sidebar)  
25 house, you know, it's --

1 (Break in audio.)

2 THE COURT: -- have to be immediate, that's just what Mr.  
3 (inaudible at 00:02, low audio at sidebar) is going to do on  
4 the facts of this case. You think he has to go in (inaudible  
5 at 00:07, low audio at sidebar.)

6 UNIDENTIFIED ATTORNEY: Well, I think --

7 THE COURT: What if you say, well, I want (inaudible at  
8 00:10, low audio at sidebar) property down the cape, I want my  
9 (inaudible at 00:11, low audio at sidebar) to use it for the  
10 first month, and then I am going to move into it the second  
11 month, are you telling me that that doesn't apply? That's  
12 (inaudible at 00:19, low audio at sidebar.)

13 UNIDENTIFIED ATTORNEY: I think what I'm saying is, and I  
14 think the way (inaudible at 00:23, low audio at sidebar.)

15 THE COURT: Just show me exactly what you want me to read?

16 UNIDENTIFIED ATTORNEY: It's just that last line because  
17 your voice, respectfully, did drop.

18 THE COURT: No, no. That's fine. (Inaudible at 00:41, low  
19 audio at sidebar) an hour and twenty minutes.

20 All right. Do you have any problems with me reading this?

21 UNIDENTIFIED ATTORNEY: No, your Honor. I was content with  
22 what you -- you're just re-reading what we agreed to.

23 THE COURT: All right. I will be happy to do that. Okay.

24 UNIDENTIFIED ATTORNEY: Thank you very much.

25 THE COURT: That's fine. That's what we do in this. Is there

1 anything else?

2 UNIDENTIFIED ATTORNEY: No.

3 UNIDENTIFIED ATTORNEY: About the jury instructions, no,  
4 your Honor.

5 THE COURT: All right. So you're on the verdict form.

6 (Inaudible at 01:01, low audio at sidebar.) They're chomping  
7 at the bit to get out there.

8 So, this is what we'll do. I will -- I will then we're  
9 going to work on the jury verdict form. You folks (inaudible  
10 at 01:15, low audio at sidebar) Exhibits in order. (Inaudible  
11 at 01:20, low audio at sidebar) we'll let them chew on the  
12 Exhibits for the next fifteen minutes, and we'll correct all  
13 this. I apologize. I am not perfect.

14 (END OF DISCUSSION AT SIDEBAR)

15 THE COURT: All right. So, what I understand -- we're going  
16 to let you go in two seconds. I am going to highlight -- not  
17 highlight. To the extent that I may have misinformed you about  
18 that case, it was an Appeals Court case, and I will read you  
19 the definition that's been agreed to between the parties and  
20 that is from the Appeals Court.

21 The homeowner's house was preexisting owner occupied  
22 building under the law that regulates home improvement  
23 contracts, although the homeowner never lived in the house  
24 where remodeling was performed, where the house was  
25 preexisting, and the owner bought it to live in.



1 All right. I tried to do that as well as I could. Is that  
2 okay with you?

3 UNIDENTIFIED ATTORNEY: Thank you very much, your Honor.

4 THE COURT: Fair enough. Fair enough. Thank you.

5 Okay. I'm happy -- and thank you very much for correcting  
6 me, it's -- these are important points. All of these are  
7 important points, but I am happy to be corrected.

8 The jury verdict slip we've collected, we have them all,  
9 okay, so we're going to -- the lawyers and I are going to work  
10 on those, we're going to swear in Ms. Mullane. We'll get you  
11 some lunch, and let's see there was one other thing I wanted  
12 to say. I think that was it. I think that was it. Okay.

13 Anything else? Am I missing anything?

14 (Discussion off the record with Clerk.)

15 (Court Officer Sworn.)

16 THE COURT: All right. And I just remembered what I wanted  
17 to tell you. Two caveats or cautionary notes.

18 One, we do not have the ability to read back a juror -- a  
19 witness's testimony. If you say, what did Mr. Smith say during  
20 the course of the trial, we don't have that -- we don't have  
21 that capability. We are on a digital system which is better,  
22 but we don't have real time capability to transcribe what you  
23 heard.

24 Two, the Exhibits are the Exhibits that have been marked.  
25 That's it. We don't open it up for any other Exhibit. If you

1 say, well what about something that you may have heard in  
2 mention or passing, if it's not marked it, it's not to be  
3 considered, you know, as a document or a photograph or  
4 whatever.

5 Anything else, counsel? No. Great.

6 UNIDENTIFIED ATTORNEY: No, your Honor.

7 UNIDENTIFIED ATTORNEY: No, your Honor.

8 THE COURT: Thank you. So we'll work on the special jury  
9 verdict slip, and thank you very much for your attention.

10 COURT OFFICER: All rise, please.

11  
12 (End of selected portion of transcript.)  
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(Adjourned)